## Question Presented

Whether the Court of Appeals was correct in setting aside the Federal Communications Commission's *Policy Statement* on Entertainment Formats where

A. in accordance with § 706(C) of the Administrative Procedure Act, it found that the *Policy Statement* violated § 309(e) of the Communications Act of 1934, because the Commission there unequivocally refused to carry out its statutorily mandated obligation to consider the effects of loss of diversity on the public interest, in deciding to grant or deny transfer or renewal applications where a unique, financially viable entertainment format would be lost, and where the Commission totally abdicated that choice to the marketplace even though agreeing that programming diversity is in the public interest, and that the marketplace sometimes fails,

and/or

B. in accordance with § 706(A) of the Administrative Procedure Act, it found the *Policy Statement* arbitrary and capricious, and lacking rationality and impartiality because

   1. it was based on fears of an "administrative nightmare" for which there was no record or historical support, and which the Commission itself subsequently disavowed; and

   2. it was based on a complete exaggeration and misreading of the court's prior format cases; and

   3. it was the result of the Commission's failure to seek ways to implement the court's binding explication of the statutory mandate, and its hostility to the court's decisions and to the listener groups who attempted to enforce them; and

4. it relied heavily on material which was never made available for public comment, analysis or rebuttal, and which was not supportive of the conclusions which the Commission drew from it;

and/or

C. it found, pursuant to § 706 of the Administrative Procedure Act, and its primary obligation to interpret the Constitution, that the procedural, statutorily mandated procedures it had set forth in its format decisions did not violate the First Amendment, and were indeed necessary to guarantee the "paramount" rights of listeners and viewers, protected by the First Amendment.



## Table of Contents


Questions Presented ..... i

Statement of the Case ..... 1

Introduction ..... 1

Statement ..... 4

A. The Regulatory Scheme ..... 4

B. The Public Interest Standard ..... 6

C. Standing to Raise Public Interest Issues -- The United Church of Christ Case ..... 10

D. The Format Cases ..... 12

The WEFM Decision ..... 15

The Format Inquiry ..... 17

The Policy Statement ..... 20

The Court of Appeals Decision ..... 22

Summary of Argument ..... 26

POINT I -- The Court of Appeals Applied the Appropriate Standard of Judicial Review, and Properly Found the Commission's Policy Statement Unlawful . 28

A. The Commission's Decision Was "in excess of statutory jurisdiction [or] -- short of statutory right" ..... 29

B. The Commission's Decision Was Arbitrary and Capricious ..... 33

1) The Administrative Nightmare Argument ..... 35

2) Exaggeration and Misstatement of the D.C. Circuit's Format Decisions ... 38

3) Failure to Consider Means of Implementing WEFM ..... 40

4) Reliance on Undisclosed Material ..... 42

C. The Policy Statement Is Invalid Because It Was Enacted in Violation of Statutory Procedure and Due Process Law ..... 43

1) The Secret Studies ..... 45

2) Reliance on Undisclosed Material Violates § 553 of A.P.A. ..... 50

POINT II – The Decision of the Court of Appeals Is Premised Upon and Compelled by the Regulatory Scheme Enacted by Congress in the Communications Act and the Consistent Interpretations of That Act by This Court and the FCC ..... 54

A. The Commission's Format Policy Violates the Statutory Scheme ..... 55

1) The Format Cases ..... 55

2) The Commission's Position – From Glenkaren to the Policy Statement ..... 57

3) Commission Errors Based on Misconceptions of the Cases and the Statutory Scheme ..... 60

B. The Court of Appeals Decision Is Consistent with and Supported by the Consistent Interpretations of the Communications Act by This Court and the Commission, and by the Act's Legislative History ..... 63

1) Decisions of This Court ..... 64

2) Agency Policy and Decisions ..... 69



3) Legislative History ..... 71

POINT III – The Decision of the Court of Appeals Is Entirely Consistent with This Court's Explication of the First Amendment in the Broadcasting Context ..... 73

The Constitutional Framework ..... 74

A. The Petitioners' Attempt to Impose a Least Drastic Means Test Would Require Overruling Red Lion and So May Not Prevail ..... 76

1) The Traditional "Less Drastic Means" Test for Constitutionality Is Inappropriate to the Physical Realities of Broadcasting and First Amendment Values Sought to Be Preserved and Furthered ..... 77

2) The "Less Drastic Means" of Insuring Diversity Proposed by Petitioners Are Neither Less Drastic Nor Responsive to the First Amendment Interests Here Under Consideration ..... 80

B. The Format Decisions Preserve and Protect All Listeners' Paramount Right to Diversity ..... 82

C. The Format Decisions Do Not Constitutionally Chill Licensee Programming Discretion ..... 84

D. The Format Decisions Do Not Provide the Anti-Censorship Provisions of the Act ..... 86

E. The Format Decisions Are Not Unconstitutionally Vague or Overbroad ..... 87

F. The Concept of Universal Service Expressed in the First Amendment and The Communications Act Makes the Format Doctrine Especially Appropriate to Protect Against the Loss of Unique Foreign Language Formats ..... 89

Conclusion ..... 93



## Table of Authorities

*Cases:*

ABC, 45 RAD. REG. 2d (P&F) 1671 (1979) ..... 8

Abrams v. United States, 250 U.S. 616 (1919) ... 91

Alabama Educational Television Commission, 33 F.C.C.2d 495 (1971), *renewal denied*, 50 F.C.C.2d 461 (1975) ..... 8

Allegheny General Hospital v. NLRB, 608 F.2d 965 (3d Cir. 1979) ..... 41

Aqua Slide 'N' Dive Corp. v. Consumer Product Safety Commission, 569 F.2d 831 (5th Cir. 1978) ..... 42

Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945) ..... 4, 6, 33, 54, 62, 70

Associated Press v. United States, 326 U.S. 1 (1945) ..... 83

Bigelow v. Virginia, 421 U.S. 809 (1975) ..... 78

Biola Schools & Colleges, Inc., 29 F.C.C.2d 787 (1971) ..... 85

Buckley v. Valeo, 424 U.S. 1 (1976) ..... 78

Carroll Broadcasting Co. v. FCC, 258 F.2d 440 (D.C. Cir. 1958) ..... 5, 65, 68

Central California Communications Corp., 70 F.C.C.2d 1947 (1979) ..... 8

Central Florida Enterprises, Inc. v. FCC, 598 F.2d 37 (D.C. Cir. 1978), *cert. dismissed*, ____ U.S. ____, 99 S.Ct. 2189 (1979) ..... 7

Channel 20, Inc., 70 F.C.C.2d 1770 (1979) ..... 8

Charles A. Haskell, 36 F.C.C.2d 78 (1972), *aff'd. sub nom.* Lakewood Broadcasting Service, Inc. v. FCC, 478 F.2d 919 (D.C. Cir. 1973) ..... 14

Chronicle Broadcasting, 18 F.C.C.2d 120 (1969) . 7

Citizens Committee to Keep Progressive Rock (WGLN-FM) v. FCC, 478 F.2d 926 (D.C. Cir. 1973) ..... 14, 15, 56, 57

Citizens Committee to Preserve the Present Programming of WONO (FM) v. FCC, No. 71-1336 (D.C. Cir. May 13, 1971) ..... 14, 15

Citizens Committee to Preserve the Voice of the Arts in Atlanta (WGKA-AM & FM) v. FCC, 436 F.2d 263 (D.C. Cir. 1970) 13, 45, 57, 60, 64

Citizens Committee to Save WEFM v. FCC, 506 F.2d 246 (D.C. Cir. 1974) (*en banc*) ..... *passim*

Citizens Communications Center, 61 F.C.C.2d 1017 (1976) ..... 37

Citizens Communications Center v. FCC, 447 F.2d 1201 (D.C. Cir. 1971) ..... 33

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) ..... 29, 34

City of Chicago v. FPC, 458 F.2d 731 (D.C. Cir. 1971) ..... 39

Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94 (1973) ..... 5, 24, 67, 75, 78, 82, 84

Commercial Radio Institute, 47 RAD REG 2d (P&F) 1307 (Rev. Bd. 1980) ..... 71

Community Television of Southern California, 72 F.C.C.2d 349 (1979) ..... 8

Consolidated Edison Co. of New York, Inc. v. Public Service Comm. of New York, ____ U.S. ____, 100 S.Ct. 2326 (1980) ..... 77

D & E Broadcasting Company, Inc., 70 F.C.C.2d 646 (1978) ..... 9

Dick Broadcasting Co., Inc. of Tenn., 47 F.C.C.2d 1051 (1974) ..... 85



FCC v. Allentown Broadcasting Corp., 349 U.S. 358 (1955) ..... 89

FCC v. Midwest Video Corp., 440 U.S. 689 (1979) ..... 6, 24, 32, 64, 67

FCC v. National Broadcasting Co. (KOA), 319 U.S. 239 (1943) ..... 33

FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775 (1978) ..... 17

FCC v. Pacifica Foundation, 438 U.S. 726 (1978) 84, 86

FCC v. Pottsville Broadcasting Co., 309 U.S. 134 (1940) ..... 31, 79

FCC v. RCA Communications, Inc., 346 U.S. 86 (1953) ..... 4, 30, 63, 66

FCC v. Sanders Brothers Radio Station, 309 U.S. 470 (1940) ..... 4, 5, 52, 64, 65, 66, 68

Flint Family Radio, 69 F.C.C.2d 38 (Rev. Bd. 1977) ..... 9, 38

George E. Cameron Jr. Communications, 71 F.C.C. 2d 460 (1979) ..... 9, 10, 38, 62, 70

Glenkaren Associates, Inc., 14 RAD.REG. 2d (P&F) 104 (1968), *reconsideration denied*, 19 F.C.C.2d 13 (1969), *rev'd sub nom.* Citizens Committee to Preserve the Voice of the Arts in Atlanta (WGKA-AM & FM) v. FCC, 436 F.2d 263 (D.C. Cir. 1970) ..... 57, 58

Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1971), *cert. denied*, 403 U.S. 923 (1971) ..... 7

Hartford Communications Committee v. FCC, 467 F.2d 408 (D.C. Cir. 1972) ..... 15

Henry v. FCC, 302 F.2d 191 (D.C. Cir. 1962) .... 87

Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977) ..... 39, 51

International Harvester Co. v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973) ..... 51

International Radio, Inc., 45 RAD. REG. 2d (P&F) 173 (1979) ..... 9, 38

Kaiser Broadcasting Corp., 45 F.C.C.2d 601 (1974) ..... 85

Koeth Broadcasting Co. Inc., 40 F.C.C.2d 534 (1973) ..... 85

Lakewood Broadcasting Service, Inc. v. FCC, 478 F.2d 919 (D.C. Cir. 1973) ..... 15

Lemon v. Kurtzman, 403 U.S. 602 (1971) ..... 24, 61

Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) ..... 77, 78

Mid-South Broadcasting Corp., 44 F.C.C.2d 981 (1973) ..... 85

Midwestern Broadcasting Co., 42 F.C.C.2d 1091 (1973) ..... 85

Mississippi Authority for Educational TV, 71 F.C.C.2d 1296 (1979) ..... 8

Mobil Oil Corp. v. FPC, 483 F.2d 1238 (D.C. Cir. 1973) ..... 51

Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470 (2d Cir. 1971) ..... 81

National Association of Theatre Owners v. FCC, 420 F.2d 194 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1970) ..... 32

National Broadcasting Co. v. United States, 319 U.S. 190 (1943) ..... *passim*

National Broadcasting Co. v. United States, 47 F. Supp. 940 (S.D.N.Y. 1942), *aff'd*, 319 U.S. 190 (1943) ..... 80



National Broadcasting Co., Inc., 39 F.C.C.2d 400 (1973) ..... 85

Newhouse Broadcasting Corp., 77 F.C.C.2d 97 (1980) ..... 86

Northern California Black Christian Group, 45 F.C.C.2d 505 (1974) ..... 85

Office of Communication of United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966) ..... *passim*

Office of Communication of United Church of Christ v. FCC, 425 F.2d 543 (D.C. Cir. 1969) ..... 19, 22, 35

Office of Communication of United Church of Christ v. FCC, 560 F.2d 529 (2d Cir. 1977) 7

Permian Basin Area Rate Cases, 390 U.S. 747 (1968) ..... 33

Police Department of Chicago v. Mosley, 408 U.S. 92 (1972) ..... 78

Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974) ..... 51

Post-Newsweek Stations, 57 F.C.C.2d 326 (1975) 85

Rebel Broadcasting Co. and Tri-Cities Broadcasting Co., 40 F.C.C.2d 619 (1973) ..... 85

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) ..... *passim*

Renaissance Broadcasting Corp., 75 F.C.C.2d 441 (1980) ..... 9

Republic Broadcasting Corp., 57 F.C.C.2d 336 (1975) ..... 85

Riverside Broadcasting Co., Inc., 64 F.C.C.2d 866 (1977) ..... 85

RKO General, Inc., 23 RAD REG. 2d (P&F) 930, *aff'd sub nom.* Hartford Communications Committee v. FCC, 467 F.2d 408 (D.C. Cir. 1972) ..... 14

Rust Communications Group, 73 F.C.C.2d 39 (1979) ..... 7

Salter Broadcasting Co., 8 F.C.C.2d 1036 (Rev. Bd. 1967) ..... 9

South Terminal Corp. v. EPA, 504 F.2d 646 (1st Cir. 1974) ..... 51

Stockholders of Rust, 64 F.C.C.2d 883 (1977) .... 85

Superior Oil Co. v. Udall, 409 F.2d 1115 (D.C. Cir. 1969) ..... 32

Television Corporation of Michigan v. FCC, 294 F.2d 730 (D.C. Cir. 1961) ..... 89

Thunderbird Broadcasting Co., 61 F.C.C.2d 1190 (1976) ..... 85

Tri Cities Broadcasting Co., 42 F.C.C.2d 499 (1973) ..... 85

TV 9, Inc. v. FCC, 495 F.2d 929 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974) ..... 7

Twin States Broadcasting, Inc., 35 F.C.C.2d 969 (1972), *rev'd. sub nom.* Citizens Committee to Keep Progressive Rock (WGLN-FM) v. FCC, 478 F.2d 926 (D.C. Cir. 1973) ..... 14, 15

UAW v. Scofield, 382 U.S. 205 (1965) ..... 11

United States v. Midwest Video Corp., 406 U.S. 649 (1972) ..... 32

United States v. Nova Scotia Food Products Corp., 568 F.2d 240 (2d Cir. 1977) ..... 50

United States v. Southwestern Cable Co., 392 U.S. 157 (1968) ..... 81



United States Lines, Inc. v. Federal Maritime Commission, 584 F.2d 519 (D.C. Cir. 1978) .. 51

Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978) ..... 42, 50, 51, 52

WAIT Radio v. FCC, 418 F.2d 1153 (D.C. Cir. 1969) ..... 33, 55

Walter E. Webster, Jr., 43 F.C.C.2d 300 (1973)... 85

Ward L. Jones, F.C.C. 67-82, 32 Fed. Reg. 1062 (Jan. 28, 1967) ..... 9

WCAB, Inc., 27 F.C.C.2d 743 (1971)..... 85

Whitney v. California, 274 U.S. 357 (1927) ..... 91

Wichita-Hutchinson Co., 20 F.C.C.2d 584 (1969). 73

Winters v. New York, 333 U.S. 507 (1948) ..... 89

WNCN Listeners Guild v. FCC, 610 F.2d 838 (D.C.Cir. 1979)(*en banc*).....*passim*

Younger v. Harris, 401 U.S. 37 (1971)..... 88

Zenith Radio Corp., 38 F.C.C.2d 838 (1972), *reconsideration denied*, 40 F.C.C.2d 223 (1973), *rev'd. sub nom.* Citizens Committee to Save WEFM v. FCC, 506 F.2d 246 (D.C. Cir. 1974)(*en banc*)..... 15, 58, 59, 64

Zenith Radio Corp., 56 F.C.C.2d 1095 (1975) .... 36

*Constitution and Statutes:*

Constitution of the United States
First Amendment..... *passim*

Administrative Procedure Act
5 U.S.C. § 553 ..... 27, 43, 50, 57
5 U.S.C. § 706 ..... ii, 28
5 U.S.C. § 706(A) ..... i
5 U.S.C. § 706(B) ..... 26

5 U.S.C. § 706(c) ..... i, 26
5 U.S.C. § 706(D) ..... 26, 35, 43
Communication Act of 1934
47 U.S.C. § 3(h) ..... 67
47 U.S.C. § 154(i) ..... 55
47 U.S.C. § 301 ..... 5
47 U.S.C. § 303(g) ..... 6, 89
47 U.S.C. § 303(r) ..... 55
47 U.S.C. § 307(a) ..... 5
47 U.S.C. § 307(d) ..... 5
47 U.S.C. § 309(a) ..... 5, 17, 54
47 U.S.C. § 309(d)(1) ..... 17
47 U.S.C. § 309(d)(2) ..... 6, 17, 54
47 U.S.C. § 309(e) ..... i, 14, 17, 54
47 U.S.C. § 310(d) ..... 73
47 U.S.C. § 310(d) ..... 5
47 U.S.C. § 326 ..... 86
47 U.S.C. § 402(b) ..... 54
Code of Federal Regulations
47 CFR § 76.5(kk) ..... 38
47 CFR § 1.106(c) ..... 47
47 CFR § 1.106(f) ..... 47
Radio Act of 1927, ch. 169, 44 Stat. 1162 ..... 69

*Other Authorities:*

Additional Views of Chairman Burch in Which Commissioners Robert E. Lee, H. Rex Lee, Reid, Wiley and Hooks Join ..... 15, 16
Brown, *Some Flavor to New Prime Time Shows*, New York Times, Jan. 1, 1976 ..... 16



B. Schmidt, *Freedom of the Press vs. Public Access*, 244 (1976) ..... 78
Center for Public Resources, *Radio Report: An Inquiry into the Potential for Expanding Diversity in Commercial Programming* (Markle Foundation 1979) ..... 16
R. Coase, *British Broadcasting, A Study in Monopoly* (1950) ..... 4
R. Coase, The Federal Communications Commission, 2 J.L. & Econ. 1 (1959) ..... 4
Davis, *Administrative Law in the Seventies (1976)* § 601-1-1 (Supp 1977) ..... 50
Davis, *Administrative Common Law and the Vermont Yankee Opinion 1980*, Utah L. Rev. 3 (1980) ..... 43
E. Barnouw, *The Golden Web, A History of Broadcasting in the United States, Vol. II-1933 to 1953*, 22 (1968) ..... 72
E. Barnouw, *The Sponsor: Notes on a Modern Potentate* (1978) ..... 16
FCC, *Public Service Responsibility of Broadcast Licensees* (1946) ..... 7, 69
Federal Radio Commission, *Second Annual Report* (1928) ..... 69
H. Kelejian & W. Oates, *Introduction to Econometrics*, 92 (1974) ..... 49
*Judicial Review of FCC Program Diversity Regulation*, 75 Colum. L. Rev. 401 (1975) ..... 37
*Policy Statement on Comparative Broadcast Hearings* (1965) ..... 70
*Program Policy Statement (En Banc Programming Inquiry)* 44 FCC 2303 (1960) ..... 70

Stewart, *Vermont Yankee and the Evolution of Administrative Procedure*, 9, Harv. L. Rev. ..... 51

Wall, *Section 309 of the Communications Act - The Renewal Provision - a Need for Change*, 25 Admin. L. Rev. 407 (1973) ..... 37

**Nos.: 79-824, 79-825, 79-826, 79-827**

IN THE

# Supreme Court of the United States

**October Term, 1979**

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
INSILCO BROADCASTING CORPORATION, ET AL.,
AMERICAN BROADCASTING COMPANIES, INC. ET AL.,
NATIONAL ASSOCIATION OF BROADCASTERS, ET AL.,
*Petitioners*

-v.-

WNCN LISTENERS GUILD, ET AL.,
*Respondents.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

## JOINT BRIEF FOR RESPONDENTS WNCN LISTENERS GUILD, INC., CLASSICAL RADIO FOR CONNECTICUT, INC., ET AL., AND OFFICE OF COMMUNICATION OF THE UNITED CHURCH OF CHRIST, ET AL.

### Statement of the Case

#### Introduction

At the outset, it is critical to note what this case is *not* about. Despite distortions and exaggerations by the Commission and other parties, this is *not* a case about pervasive format regulation, nor about usurpation of an agency's policy-making authority by a reviewing court, nor about an agency's deter-

mination of the best way to implement its governing statute.

This case is, rather, about a blatant and unlawful attempt by the Federal Communications Commission to avoid doing exactly what the Communications Act of 1934 requires it to do - regulate in the public interest.

The Commission, in the *Policy Statement* here under review, has turned its back not only on clear statutory language mandating it to make public interest determinations in specified situations, but on 40 years of its own practice in administering a licensing scheme whose purpose is to maximize the fundamental public interest in diversity of programming.

While paying lip service to the importance of diversity and of service to minority tastes, the Commission has precluded the public from being heard on issues of vital concern to it; by holding that it will under no circumstances even "look" at the impact on diversity caused by the loss of a unique format, it has improperly and unlawfully carved out a content-based exception to the standing conferred on representatives of the public by Mr. Chief Justice (then Circuit Judge) Burger's holding in the *United Church of Christ* case.

By eschewing statutorily mandated regulation for a policy which defers completely to marketplace competition, the Commission has abandoned its obligation to make choices among licensees and potential licensees. Instead, it has abdicated that role to advertisers who determine what listeners it is most profitable for a broadcaster to reach. Such abdication of responsibility is not only clearly in violation of the Act, it is also profoundly anti-democratic, giving to those who have the power of the market, rather than those appointed by and responsible to elected officials, unbridled authority to determine what shall be heard, and who shall be served.



Casting its lot entirely with the marketplace, even while admitting that the marketplace sometimes fails, the Commission has violated its clear statutory obligation to make individualized determinations of the public interest, convenience and necessity.

Refusing to follow the statute, although repeatedly mandated to do so by the Court of Appeals, the Commission has violated both the principles of judicial supremacy and the separation of powers. It has, with no lawful authority, attempted to do unilaterally what Congress - although frequently so requested - has not seen fit to do: relieve it of the obligation to regulate.

The Court of Appeals, reviewing the *Policy Statement* and the *Inquiry* which produced it, has once again, consistent with the A.P.A. standard of judicial review, construed the Act and struck down the Commission's action as violative of its provisions. The court has not substituted its policy views for those of the Commission. Both agree that diversity is in the public interest; both agree that the marketplace generally promotes diversity.

The difference between the Commission and the court arises only in those situations where the marketplace fails. The Commission would do nothing; the court requires only that under limited conditions it must *consider* the loss of a unique format in deciding whether to grant a particular application.

The Commission need not necessarily grant a hearing; the existence of any of a number of undisputed facts may permit it to make its determination without one. The Commission need not necessarily grant or deny that application; the public interest determination is within its expert but principled discretion. What is not within the Commission's discretion is whether to make the public interest determination at all.

This is what this case is about, and on this basis the thoughtful and restrained opinion of the Court of Appeals must be affirmed.

## Statement

### *A. The Regulatory Scheme*

In 1927 Congress made a fundamental choice about how to deal with the rapidly developing, but still uncharted, electromagnetic spectrum. Of a number of possible models,[1] including pure competition for both allocations and frequencies, it selected public ownership of the broadcast spectrum and allocation and regulation of the use of radio frequencies[2] by a licensing system, *see, e.g., FCC v. Sanders Brothers Radio Station*, 309 U.S. 470, 474 (1940) [*Sanders Bros.*].

While licenses were to be awarded to private entities, the public's ultimate, undivided ownership and paramount rights[3] were guaranteed by a regulatory scheme based on the principles of licensee "trusteeship" for

[1] It could, for example, have treated the spectrum like other resources such as land, gas, etc., and simply created property rights which could then have been disposed of like property rights in other resources. Such disposal could have resulted from one-time governmental action of selling, auctioning, or granting the rights to individuals or groups who were thereafter free to use or dispose of them in accordance with classic pricing mechanisms. This is the choice which certain neoclassical economists would prefer, *see, e.g.*, Coase, *The Federal Communications Commission*, 2 J.L. & Econ. 1 (1959), but which they recognized did not occur. *See Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 335-36 (1945) (Frankfurter, J., dissenting) [*Ashbacker*]. Similarly, Congress could have followed the European model, retaining not only ownership of the broadcast spectrum, but direct control through creation of a nationalized broadcasting system. *See, e.g.*, R. Coase, BRITISH BROADCASTING, A STUDY IN MONOPOLY (1950). Of course, it did neither.

[2] As Justice Frankfurter wrote:

> The very fact that Congress has seen fit to enter into the comprehensive regulation of communications embodied in the Federal Communications Act of 1934 contradicts the notion that national policy unqualifiedly favors competition in communications.

*FCC v. RCA Communications, Inc.*, 346 U.S. 86, 93 (1953) [*RCA*].

[3] *See, e.g., Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) [*Red Lion*].



the public, *see, e.g., Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 117 (1973) [*CBS v. DNC*], and competition[4] among those desiring to be licensees as to which of them would best serve the "public interest, convenience and necessity." 47 U.S.C. § 307(a), (d); 309(a); 310(d) [the "public interest" standard].

In accordance with this statutory scheme in all licensing situations, the Commission is thus required to make a determination that the public interest will be served before it may grant the application -- whether for an initial license,[5] a renewal,[6] or a transfer[7] -- before it. Where there are competing or "mutually exclusive" applicants, the Commission must, as a statutory

[4] It is important at the outset to note that the congressional scheme contemplates and is structured upon continuous competition between licensees and potential licensees for the right to operate on a particular frequency. Such competition is thought to serve the public interest in the best practicable service on a given frequency at any given time, and underlies, for example, the statutory requirement of hearings on mutually exclusive applications, the ability for competing applicants to file against licensees at renewal time, etc. "Thus the channels presently occupied remain free for a new assignment to another licensee in the interest of the listening public." *Sanders Bros., supra*, 309 U.S. at 475.

The competition for licenses contemplated by the Act is quite different from that among licensees of different frequencies who compete with each other for advertisers or audiences. This latter case, audience competition, is not generally dealt with by the Act; however, where such audience competition will have a negative impact on the public interest, the Commission will take it into account in discharging its regulatory duties. *See, e.g., Sanders Bros., Carroll Broadcasting Co. v. FCC*, 258 F.2d 440 (D.C. Cir. 1958).

[5] 47 U.S.C. § 309(a).

[6] All licenses must be reviewed every three years. 47 U.S.C. § 307(d). The Act specifically and unequivocally provides that no licensee has any rights in the license beyond the three-year period. 47 U.S.C. § 301.

[7] Transfer applications and assignment applications, both of which are subject to the same standards as initial applications, 47 U.S.C. § 310(d), will for convenience be interchangeably referred to herein as "transfers."

matter, hold a hearing. *Ashbacker*. The Act also requires that a hearing be held

> [i]f a substantial and material question of fact is presented or if the Commission for any reason is unable to find that grant of the application would be consistent with the public interest, convenience and necessity.

47 U.S.C. § 309(d)(2).

In making the requisite "public interest" finding, the Commission is guided by the language of the statute[7] and by forty years of case law which is essentially undisputed here.

### *B. The Public Interest Standard*

The Commission's most consistent, and consistently expressed concerns have been the "maximization of outlets for local expression" and diversification of programming." *FCC v. Midwest Video Corp.*, 440 U.S. 689, 699 (1979) [*Midwest Video II*]. While the former relates more generally to the Commission's allocations policy, the latter goes to the heart of the public interest determinations which the Commission must -- and generally does[8] -- make in the licensing process.

Programming is, after all, what the present or potential licensee has to offer, and it is on its ability

[7]The Act requires the Commission to "encourage the larger and more effective use of radio in the public interest." 47 U.S.C. § 303(g). Interpreting the Act, Mr. Justice Frankfurter wrote that its "avowed aim" was "to secure the maximum benefits of radio to all the people of the United States." *National Broadcasting Co. v. United States*, 319 U.S. 190, 217 (1943) [*NBC v. U.S.*]

*Id.*, establishing stations in as many localities as possible, and requiring broadcasters to provide local news and public affairs programming.

[8]The exception has been, and continues to be, the format cases.



to program[11] and its program proposals,[12] or past history[13] and other factors which relate more or less directly to its programming[14] that it is judged by the Commission.[15] For example, in the year 1979 alone, the Commission, in dealing with renewal applications, has considered claims that a licensee does

[11]For example, an applicant must meet certain financial requirements before he can be granted a license.

[12]An initial applicant is asked to describe its program proposals and to demonstrate how those proposals would contribute to diversity in its service area. *See* FCC Form 301, Part III, Questions 17-18. We suspect that the deletion, shortly before the issuance of the *Policy Statement*, of the latter question from the renewal application form, *Revision of Form 303*, 59 F.C.C.2d 750 (1976), was directly influenced by the Commission's position in this proceeding.

[13]The Commission and the courts have repeatedly said that a renewal applicant must "literally 'run on his record'." *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994, 1007 (D.C. Cir. 1966) (Burger, J.), while there are a number of views as to exactly what weight that record - its excellence, substantiality, or mediocrity - may have in a comparative determination, *compare, e.g., Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1971), *cert. denied*, 403 U.S. 923 (1971), with *Central Florida Enterprises, Inc.*, 598 F.2d 37 (D.C. Cir. 1978), *cert. dismissed*, ___ U.S. ___, 99 S.Ct. 2189 (1979).

There is no question that the licensee's programming is at issue; several subsidiary policies further demonstrate this. For example, meritorious programming will be deemed to mitigate other issues raised against a licensee, *see Chronicle Broadcasting*, 18 F.C.C.2d 120 (1969), but, unlike other areas where post-renewal upgrading may be considered, program upgrading will not, *see Rust Communicatons Group*, 73 F.C.C.2d 39 (1979).

[14]For example, the Commission has viewed both minority ownership and minority employment as factors influencing a licensee's programming decisions - hopefully toward producing more minority programming. *See, e.g., TV 9, Inc. v. FCC*, 495 F.2d 929 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974); *Office of Communication of United Church of Christ v. FCC*, 560 F.2d 529 (2d Cir. 1977).

[15]This determination of the licensee's ability to serve the public interest by his programming is a long-standing and consistent policy, *see, e.g.*, FCC, PUBLIC SERVICE RESPONSIBILITY OF BROADCAST LICENSEES (1946) [BLUE BOOK]; *Program Policy Statement (En Banc* Programming Inquiry), 44 F.C.C. 2303 (1960).

not provide adequate children's programming,[16] or programming to women and children,[17] or to a substantial Spanish-American community,[18] or that licensee has ignored issues significant to the Black community,[19] or has not provided programming of specific interest to residents of New Jersey.[20] In each instance, the Commission has reviewed lists, descriptions, and in some instances transcripts of programs submitted by the licensee to determine whether or not its programming has met the public interest standard.

---

[16] *Channel 20, Inc.*, 70 F.C.C.2d 1770 (1979).

*Community Television of Southern California*, 72 F.C.C.2d 349 (1979).

[17] *Central California Communications Corp.*, 70 F.C.C.2d 1947 (1979).

[18] *Mississippi Authority for Educational TV*, 71 F.C.C.2d 1296 (1979); *ABC*, 45 RAD.REG. 2d (P&F) 167 (1979). In *Alabama Educational Television Commission*, 33 F.C.C.2d 495 (1971), *renewal denied*, 50 F.C.C.2d 461 (1975) the Commission recently denied a renewal on such grounds.

[19] *Educational Broadcasting Corp.*, 70 F.C.C.2d 2204 (1979).



In this determination, comparative[21] or otherwise,[22] the Commission has always considered the relationship of programming to overall diversity. The comparative "merit" awarded for a proposal of specialized or unique service is the most dramatic example of the Commission's long-standing inclusion of diversity of programming -- and the corresponding importance of unique formats -- in licensing decisions.

Three years after the *Policy Statement* in this case, the Commission held that applications for licenses should be designated for hearing under the standard comparative issue where the applicant made a showing "that a proposed specialized format is not available in the particular market in a substantial amount." *George E. Cameron Jr. Communications*, 71 F.C.C.2d 460, 465 (1979).

---

[21] Specialized formats, unique or otherwise, were always considered meritorious, and under the practice followed since the 1965 *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393, 397 n. 9 (1965) proposal of such service in a comparative proceeding would automatically have prompted an inquiry under the standard comparative issue. *See Ward L. Jones*, F.C.C. 67-82, 32 Fed.Reg. 1062 (Jan. 28, 1967); *Salter Broadcasting Co.*, 8 F.C.C.2d 1036 (Rev. Bd. 1967).

The policy was somewhat limited in *Flint Family Radio*, 60 F.C.C.2d 38 (Rev. Bd. 1977) where two out of three applicants proposed "specialized formats" but no preference was given because both types of programming were already present in the community in reasonable amounts (*i.e.*, the proposed formats were not unique).

[22] The importance of programming diversity has also made this issue part of the public interest determination in allocations proceedings. For example, the Commission has granted a waiver of its nighttime allocation rule to an applicant which proposes the first nighttime Spanish language service to its listening area, *e.g.*, *International Radio, Inc.*, 45 RAD.REG. 2d (P&F) 173 (1979); *D&E Broadcasting Company, Inc.*, 70 F.C.C.2d 646 (1978), and has granted a waiver to a subscription television applicant who promised to increase diversity by offering substantial amounts of New Jersey-oriented and locally produced programming. *Renaissance Broadcasting Corp.*, 75 F.C.C.2d 441 (1980).

In other words, even as of this date, the Commission *requires* a hearing in a comparative situation where a license applicant proposes to *increase* diversity by offering a unique format.

### *C. Standing to Raise Public Interest Issues -- The United Church of Christ Case*

Prior to 1966, the relationship of specialized or unique formats to that diversity required under the public interest standard could arise only in comparative proceedings between broadcasters, such as in the *Cameron* case, *supra*, because only those persons alleging electrical interference or direct economic injury had standing to participate in Commission licensing decisions.

In 1966, however, the manner and context in which public interest diversity issues might be raised was substantially broadened by Judge, now Chief Justice Burger's seminal and eponymous decision in *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966) [*UCC I*].

The court there held that responsible representatives of the listening public should be given standing, since, under the Communications Act,

> standing is accorded to persons not for the protection of their private interest, but only to vindicate the public interest.

*Id.* at 1001.

Because listeners are those "most directly concerned with and intimately affected by the performance of a licensee," *id.*, the court saw no reason to exclude them from license proceedings, writing:



> [t]his much seems essential to insure that the holders of broadcasting licenses be responsive to the needs of the audience, without which the broadcaster could not exist.

*Id.* at 1002.[23]

The court specifically found that deference to, or reliance on the Commission was neither an adequate nor an appropriate way of insuring that the public interest standard was met. *Id.* at 1003. Reliance on the Commission, to the exclusion of the public, was inadequate because the vast duties and jurisdiction of the Commission made it impossible to "monitor or oversee the performance of every one of thousands of licensees." *Id.* Reliance on the Commission was inappropriate, because it might require "some form of governmental supervision or 'censorship' mechanisms."[24] *Id.*

On the other hand, allowing public reaction through participation in licensing decisions

> rather than depending on governmental initiative is also desirable in that it tends to cast governmental power, at least in the first instance, in the more detached role of arbiter rather than accuser.

*Id.*[25]

---

[23] The necessity to confer standing on listeners found in *UCC I* is, of course, inconsistent with the Commission's position in the *Policy Statement* that listeners adequately cast their vote in the marketplace by the choice of whether or not to listen.

[24] "Nor does the fact that the Commission itself is directed by Congress to protect the public interest constitute adequate reason to preclude the listening public from assisting in that task. *Cf. UAW v. Scofield*, 382 U.S. 205, 86 S.Ct. 335, 15 L.Ed.2d 304 (1965)." *Id.*

[25] In other words, that very participation in raising unique format issues which the Commission argues *violates* the First Amendment by allegedly chilling licensee's programming choices was seen by the *UCC I* court as the least restrictive means of insuring that the public interest standard of the Act was carried out. *See* discussion at p. 82 *infra*.

The court made clear that this standing included, and indeed required listeners to raise programming issues since

> unless the listeners – the broadcast consumers – can be heard, there may be no one to bring programming deficiencies . . . to the attention of the Commission in an effective manner.

*Id.* at 1004-1005.

The result of the *UCC I* decision was that, for the first time, there were parties who were able to raise questions relating to the public interest effect of the *loss* of diversity from the threatened loss of a unique format, rather than the gain from the addition of such a format. The public interest in diversity is precisely the same; it is only the context in which it arises – *i.e.*, renewals or transfers, rather than initial grants or comparative renewals – and the parties who may raise it which have changed.[7]

### *D. The Format Cases*

Not surprisingly, shortly after the decision in *UCC I*, the Commission was confronted by the first of a series of cases brought by listener groups who complained that the abandonment of a unique format by a prospective transferee would have a serious negative impact on the public interest in diversity.

In August of 1969, the Commission granted, without a hearing, a contested application for transfer of an Atlanta radio station, WGKA, refusing to weigh the

[7] This is the basis for the D.C. Circuit's statement in *Citizens Committee to Save WEFM v. FCC*, 506 F.2d 246 (D.C. Cir. 1974) (*en banc*) [*WEFM*] that

> [W]e think it axiomatic that preservation of a format [that] would otherwise disappear, although economically and technologically viable and preferred by a significant number of listeners, is generally in the public interest.

*Id.* at 255 (footnote omitted).



effect on the public interest of the transferee's proposed format change from classical music to a "blend" of lighter music. A survey demonstrated that some 16% of Atlanta listeners preferred classical music, which was available only on WGKA, while the proposed format duplicated one which was already broadcast on a number of stations.

The Court of Appeals reversed, *Citizens Committee to Preserve the Voice of the Arts in Atlanta (WGKA-AM & FM) v. FCC*, 436 F.2d 263 (D.C. Cir. 1970) [*Atlanta*], stating that "the substantial issue presented is that of the necessity for a hearing." *Id.* at 268.

Looking to specific statutory language, the court wrote:

> The Federal Communications Act provides that no license may be transferred "except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby." 47 U.S.C. § 310(b)
>
> * * *
>
> Section 309(e) of the Act provides that if, in the case of any such application, "a substantial and material question of fact is presented," or the Commission is for any reason unable to make the prescribed finding, "it shall formally designate the application for hearing * * *."

*Id.*

Because the court found a number of disputed factual issues,[8] including the impact on diversity, and thus the public interest, of the proposed format

[8] One of these was the financial viability of the classical music format sought to be abandoned. No one has ever suggested that a licensee is required to retain, or a transferee to program a format which cannot generate some profit.

change,[28] it reversed the Commission and remanded for a § 309(e) hearing on those issues.

In 1971 the Commission amended its *Ascertainment Primer*, presumably to conform with the *Atlanta* decision.[29] However, during the four years after *Atlanta*, the Commission granted four more transfer applications without designating hearings, despite the fact that citizens groups had raised the issue of loss of a unique format in petitions to deny,[30] and these cases were appealed to the Court of Appeals.

---

[28]The court noted the Commission's argument, repeated here, that it could not be a "national arbiter of taste" but also noted its concession that

> This is not to say that a transferee may make wholly indiscriminate program changes

*Id.* at 272 n. 7.

The court gave short shrift to the Commission's exaggerated reservations, stating

> The question is, as here, what are the community needs and will they be properly served by the proposed transfer? The Commission is not dictating tastes when it seeks to discover what they presently are, and then to consider what assignment of channels is feasible and fair in terms of their gratification

*Id.*

[29]Applicants who intended to "substantially change" a program format were told to

> be prepared to support their proposals to change formats in light of the needs and tastes of the community and the types of programming available from other sources

*Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 F.C.C.2d 650, 680 (1971).

[30]These were *Citizens Committee to Preserve the Present Programming of WONOEM v. FCC*, No. 71-1336 (D.C. Cir., May 13, 1971)(summary reversal on application for stay); *Twin States Broadcasting, Inc.*, 35 F.C.C.2d 969 (1972), *rev'd sub nom. Citizens Committee to Keep Progressive Rock (WGLN-FM) v. FCC*, 478 F.2d 926 (D.C. Cir. 1973) [*Progressive Rock*]; *Charles A. Haskell*, 36 F.C.C.2d 78 (1972), *aff'd sub nom. Lakewood Broadcasting Service, Inc. v. FCC*, 478 F.2d 919 (D.C. Cir. 1973) [*Lakewood*]; and *RKO General, Inc.*, 23 RR2d/RG 2d (P&F) 930, *aff'd sub nom. Hartford Communications Committee v. FCC*, 467 F.2d 408 (D.C. Cir. 1972) [*Hartford*].



In two of them, the court agreed that no material issues of fact were raised;[31] one involved only a stay application.[32] The fourth was *Progressive Rock*, where material issues were raised as to the uniqueness and financial viability of a format sought to be abandoned. The D.C. Circuit, on appeal, again explained to the Commission that format changes affecting diversity must be treated no differently than any other element affecting the public interest -- *i.e.*, if there are factual disputes a hearing must be held; if there are no factual disputes, it need not.[33]

## The WEFM Decision

In 1973, confronted with the petition to deny a transfer application which allegedly would have eliminated a unique classical music format in Chicago, the Commission again refused to hold a hearing. Denying a petition for reconsideration, a majority of Commissioners also issued a separate "policy statement" in which they stated their belief that the efficacy of market forces in the area of entertainment formats made it both unwise and essentially unnecessary for the Commission to consider a format issue where it was raised in a petition to deny. *Zenith Radio Corp.*, 40 F.C.C.2d 223, 230 (1973).[34]

---

*Lakewood* and *Hartford*.

[32]*Citizens Committee to Preserve the Present Programming of WONOEM v. FCC*, *supra*.

[33]The court noted what was becoming a seemingly intransigent position by the Commission regarding the refusal to consider this diversity issue as raised by listeners in licensing proceedings, and wrote

> It is our distinct impression . . . that the Commission desires as limiting an interpretation [of *Atlanta*] as possible. We suspect, not altogether facetiously, that the Commission would be more than willing to limit the precedential effect of [*Atlanta*] to cases involving Atlanta classical music stations

*Progressive Rock*, *supra*, 478 F.2d at 930.

[34]This was the *Additional Views of Chairman Burch In Which Commissioners Robert E. Lee, H. Rex Lee, Reid, Wiley and Hooks join* [the *Burch Statement*].

However, the *Burch Statement* at least apparently qualified any notion that market forces were dispositive, stating:

> This is not to say, however, that licensees or applicants have unbridled discretion in selecting their entertainment formats. The Commission will take an extra hard look at the reasonableness of any proposal which would deprive a community of its only source of a particular type of programming . . . *If and when there is a showing of facts* before the Commission *indicating that . . . the format change will eliminate a service to the public not otherwise available . . . a hearing may be required.*

*Id.* at 231 (emphasis added).

The D.C. Circuit heard the appeal *en banc*. *WEFM*. The court expressed its disagreement with the *Burch Statement*'s assumptions that marketplace economics will inevitably promote diversity and serve the public interest,[15] but its review and restatement of prior holdings was ultimately premised not on conflicting policy judgments, but rather squarely in a statutory analysis of §§ 309(a), (d)(1) and (d)(2) of the Communications Act,[16] 47 U.S.C. §§ 309(a), (d)(1) & (d)(2). *See WEFM, supra*, at 506 F.2d at 258-59.



The court wrote, once again:

> When faced with a proposed license assignment encompassing a format change, the FCC is obliged to determine whether the format to be lost is unique or otherwise serves a specialized audience that would feel its loss. If the endangered format is of this variety, then the FCC must affirmatively consider whether the public interest would be served by approving the proposed assignment, which may, if there are substantial questions of fact or inadequate data in the application or other officially noticeable materials, necessitate conducting a public hearing in order to resolve the factual issues or assist the Commission in discerning the public interest.

*WEFM, supra*, 506 F.2d at 262.

## The Format Inquiry

The Commission chose not to seek this Court's review of the *WEFM* decision, but rather determined to institute an "Inquiry," *In the Matter of Development of Policy Re: Changes in the Entertainment Formats of Broadcast Stations, Notice of Inquiry*, 57 F.C.C.2d 580 (1976), FCC App. 60a-116a [*Notice of Inquiry*],

---

[15] The court wrote:

> there is, in the familiar sense, no free market in radio entertainment because over-the-air broadcasters do not deal directly with their listeners. They derive their revenue from the sale of advertising time.

*Id.* at 268.

It went on to speak of the problem of audience demographics which often drastically limits the number and kind of potential listeners a broadcaster – mindful of his advertisers – will wish to reach. The statements made by the court are entirely unexceptional and are supported by commentators, *see* Center for Public Resources, RADIO REPORT: AN INQUIRY INTO THE POTENTIAL FOR EXPANDING DIVERSITY IN COMMERCIAL PROGRAMMING (Markle Foundation 1979) (the "marketplace" for which advertisers aim is only 60% of the population of potential listeners, dependence on ratings is a disincentive to diversity, *id.* at 7, 22). *See generally* E. Barnouw, THE SPONSOR: NOTES ON A MODERN POTENTATE (1978), and examples well known to the Commission. *See, e.g.*, Brown, *Some Flavor to New Prime Time Shows*, New York Times, Jan. 1, 1976 (Lawrence Welk Show, one of the most popular on television, cancelled because a large portion of its audience was older Americans with low discretionary incomes).

[16] In other words, the *WEFM* decision was an explication of statutorily mandated procedure under § 309(e), much like this Court's decision in *Ashbacker*, rather than a choice of, or substitution of its own views on policy, as this Court found occurred in *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978) [*NCCB*].

into whether or not it should follow that decision.[17] 57 F.C.C.2d at 582, FCC App. 66a.

In engaging in this entirely unorthodox enterprise, however, the Commission demonstrated that its past resistance and "enduring concern" were based on a total misreading of what the Court of Appeals had done. It paraphrased the *WEFM* decision as presenting the question

> Whether the public interest standard of the Communications Act of 1934, as amended, requires *close scrutiny of broadcast entertainment formats to assure an appropriate diversity?*

*Notice of Inquiry*, 57 F.C.C.2d at 582, FCC App. 65a (emphasis added).

Further, the *Notice* described the results of the *WEFM* decision as

> rejecting the programming choices of individual broadcasters in favor of a system of pervasive government regulation.

57 F.C.C.2d at 583, FCC App. 65a.

---

Commissioner Hooks concurred in the *Notice of Inquiry* insofar as it heralded an attempt to devise regulations for effectuating the *WEFM* decision. Significantly, he wrote:

> I was one of those who joined former Chairman Dean Burch's statement in *WEFM* wherein we expressed a natural dread of becoming too deeply enmeshed in format choices. But, after reading again the decisions in the so-called "format cases", and, however loathe we personally may be to lay hands on the format porcupine, the final responsibility of assuring service to all segments of the community may ineluctably abide here.

57 F.C.C.2d at 588, FCC App. 78a-79a (footnotes omitted).



This, of course, was nothing like what the Court of Appeals had decided,[18] but the Commission proceeded to answer its own question in a proceeding which was as fraught with error as its phrasing of the question had been.

The *Inquiry*, from its inception to its conclusion, cannot be even charitably characterized as anything other than a sham. The *Notice*'s statement that "the course charted by the Court may lead only to expense, delay and stagnation," 57 F.C.C.2d at 584, FCC App. 69a, made abundantly clear that the Commission had entirely prejudged the issue. The record of the *Inquiry* itself was filled with procedural irregularities, violations of the Administrative Procedure Act [A.P.A.],[19] and a generally impermissible attitude of "hostility and impatience"[20] toward the public interest groups who participated.

---

[17] Clearly the court's decision did not require "close scrutiny of broadcast entertainment formats" in general, since it was based entirely upon the statutory requirement of a hearing only in very carefully delineated circumstances. Further, the Court of Appeals never even suggested that the Commission should generally *assure* diversity, but rather held only that, in the same carefully delineated circumstances, it should look at whether the loss of a particular format in a particular assignment situation would substantially *decrease* diversity.

[18] Foremost among these was reliance on staff studies whose existence the Commission had not disclosed, although requested under the FOIA, prior to issuing its decision, thus precluding any public comment. To compound the error, although the "results" of the studies were appended to the *Policy Statement*, the underlying data and methodology employed to reach conclusions was not. Despite additional motions and FOIA requests, the material necessary to evaluate and rebut the staff studies was not finally fully disclosed until long after the period to petition for reconsideration had passed. The chronology of the Commission's "secret studies" error is discussed *infra* at pp. 45-49; significantly, at least one judge believed that the decision should be reversed solely on that ground. *WNCN*, 610 F.2d at 858, FCC App. 41a (concurring opinion of Bazelon, J.).

[19] *Office of Communication of United Church of Christ v. FCC*, 425 F.2d 543, 548-50 (D.C. Cir. 1969) [*UCC II*].

**The Policy Statement**

Given the *Notice of Inquiry* and the proceeding of the *Inquiry*, the *Memorandum Opinion and Order*, 60 F.C.C.2d 858 (1976), FCC App. 117a-175a [the *Policy Statement*] was not surprising, except in one respect. Although the Commission reiterated its faith in marketplace economics to maximize diversity, 60 F.C.C.2d at 863, 864, FCC App. 128a, 130a, significantly, it admitted that there clearly were instances where market forces failed. *Id.*

It was with regard to this latter situation that the Commission finally departed entirely from the language -- if not the result -- of the *Burch Statement*. It wrote:

> The Commission has indicated that it would take an extra hard look at the reasonableness of any proposal that would deprive a community of its only source of a particular type of programming. *Zenith Radio Corporation*, 40 F.C.C.2d at 231. Having given the entire matter further study, however, we have concluded that such a position is neither administratively tenable nor necessary in the public interest. Rather, as discussed herein, we believe that the market is the allocation mechanism of preference for entertainment formats, and that Commission supervision in this area will not be conducive either to producing program diversity nor satisfied radio listeners.

60 F.C.C.2d at 866 n. 8, FCC App. 134a n. 8.

Thus, even though the Commission once again restated its long-held policy that diversity in programming is part of the public interest standard applicable in § 309 determinations, 60 F.C.C.2d at



863, FCC App. 128a,[41] it flatly refused ever to even *look* at the effect the loss of a unique format might have on diversity in instances of clear marketplace failure.

Commissioner Hooks dissented, stating:

> without suggesting an alternative response to minority format abandonment, the majority does not provide a mechanism to ensure service to significant minority tastes and needs if market forces do not. *In this Republic, the role of regulation of commerce has been to offset and remedy errant or inefficient market forces.* The Commission's role in the commercial regulatory structure is well defined.
>
> I do not intend to imply a desire for the end of "format radio" or wish to impose a comprehensive duty on every station to proportionately serve every entertainment preference. Neither do I wish to impede program experimentation and creativity. But, equally, I stand by the *Separate Statement* of former Chairman Dean Burch in the *WEFM* case, which I joined, *recognizing that extreme cases should compel our official attention.*

60 F.C.C.2d at 882, FCC App. 171a-172a (emphasis added).

---

[41] The Commission's restatement is entirely in accordance with the Court of Appeals' prior exegesis of the public interest in diversity of programming, and with its reiteration of that issue below. The difference is not in interpretation of the statutory public interest standard, but only as to whether the procedures prescribed by the statute to effectuate the standard may be ignored.

## The Court of Appeals Decision

The Court of Appeals, again sitting *en banc*, reviewed the *Policy Statement* under the traditional standards of the A.P.A.

The court emphasized that because its prior decisions were based "solely in the context of the current regulatory scheme laid down by Congress," *WNCN Listeners Guild v. FCC*, 610 F.2d 838, 857 (D.C. Cir. 1979) (*en banc*), FCC App. 2a, 38a [*WNCN*], the Commission was bound by its interpretation of the statute. It compared the *Policy Statement*'s response to that binding procedural interpretation as not unlike the Commission's earlier response to the decisions in *UCC I* and *UCC II*.[42]

The court also found the *Policy Statement* totally lacking in impartiality and rationality. *WNCN*, *supra*, 610 F.2d at 846, FCC App. 14a. The former derived from numerous procedural violations[43] including the previously discussed "secret studies,"[44] the latter from the Commission's total misreading and "Manichaean" analysis of the format cases, 610 F.2d at 849-51, FCC App. 21a-26a, and its articulated justifications for abandoning its clear statutory duty.

---

[43] The court wrote:

> In *United Church of Christ*, as here, the Commission asserted all manner of difficulties with the Court's interpretation of the statute – including notably severe administrative burdens hampering the discharge of its regulatory responsibilities . . . The Commission, despite its parade of horribles in [*UCC*], has obviously survived.

610 F.2d at 857, FCC App. 38a.

[44] The court also noted, *inter alia*, the Commission's total failure to consider many of the comments filed by public interest groups, particularly as those comments had, in good faith, responded to the Commission's rhetorical inquiries about how to implement the format decisions – if, of course, it chose to do so. 610 F.2d at 850, FCC App. 22a-23a. Such failure is also arguably a fatal violation of § 553 of the A.P.A. *See* discussion at pp. 40-41 *infra*.

[42] *See* note 39 *supra*, and discussion at pp. 45-53 *infra*.



The court analyzed and disposed of those four justifications as follows:

1) First, as to the Commission's claim that the record showed "how effective the tool of competition has been in carrying out Congress' plan for entertainment programming," *Policy Statement*, 60 F.C.C.2d at 861, FCC App. 124a, the court found that insofar as the record relied on primarily consisted of the unreleased, untested secret staff studies, that record was legally inadequate, *WNCN*, *supra*, 610 F.2d at 846, FCC App. 15a. Also, as a legal matter, the finding that the variation of audience shares within a given format is nearly as great as the variation among formats is ultimately entirely irrelevant to the question of whether the Act requires the Commission to look at the loss of diversity in the threatened abandonment of a particular unique format (*i.e.*, when market forces *fail* to preserve or maximize diversity) in the context of a required public interest[45] finding.

2) The "administrative nightmare" stressed by the Commission in its *Policy Statement* and briefs to the Court of Appeals was conceded by counsel at oral argument to be an "exaggeration" and not "very significant at all," *WNCN*, *supra*, 610 F.2d at 849, FCC App. 20a, a voluntary but necessary characterization which the Court of Appeals determined was amply supported by an examination of the actual burdens imposed on the Commission by the format cases since *Atlanta*.[46] *WNCN*, *supra*, 610 F.2d at 848, FCC App. 18a.

---

[45] Here the Commission's repeated apparent confusion of "consumer satisfaction" with the "public interest, convenience and necessity" may have played a large part in its misunderstanding of the statutory issue.

[46] *WNCN*, *supra*, 610 F.2d at 848-849, FCC App. 18a-20a. *See* discussion at pp. 35-38 *infra*.

The court also noted that the extent to which the Commission's *Policy Statement* laid so much stress[47] on an argument which was so lacking in actual merit was another factor "casting considerable suspicion on the rationality of that decision." 610 F.2d at 849, FCC App. 20a.

3) The Court of Appeals found that the Commission's argument that *WEFM* required it to impose an improper, common-carrier-like obligation on broadcasters was, based on this Court's decisions, legally incorrect. Both *CBS v. DNC* and *Midwest Video II* discussed "common-carrier-like obligations" as involving the requirement of some form of private access -- not the requirement which has been upheld since the beginning of the Act that licensees are, as a condition of their licenses, required to provide programming which serves the public interest, *see e.g., Red Lion.*

4) The Court of Appeals found that the Commission's First Amendment fears were also premised on its "drastic misreading of the format cases," 610 F.2d at 850, FCC App. 23a.[48] Rather than requiring pervasive, comprehensive governmental inquiry in *choosing* all formats, those decisions required no more review of programming in limited individual circumstances than has been repeatedly recognized

[47] The court aptly characterized the language of the briefs and decisions on this issue as "almost frenzied rhetorical excess." 610 F.2d at 849, FCC App. 20a.

[48] As the Court of Appeals wrote, the Commission

> analyzed the problem in stark terms: formats are to be chosen *either* by market forces *or* by "the alternative to the imperfect system of free competition . . . a system of broadcast programming by government decree." *Denial of Reconsideration, supra*, 86 F.C.C.2d at 81. *WEFM*, in the Commission's view, is the antithesis of the free market: it mandates a "system of pervasive governmental regulation." *Notice of Inquiry, supra*, 57 F.C.C.2d at 582, requiring "comprehensive, discriminating, and continuing state surveillance." *Policy Statement, supra*, 68 F.C.C.2d at 865, *citing Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971).

610 F.2d at 850, FCC App. 23a.



as consistent with, and indeed required by, the Communications Act.[49]

The Court of Appeals reviewed the record for evidence of the Commission's oft-stated contention that the format decisions would deter experimentation and innovation and found none. The Commission's own study, to the contrary, "concluded that under the *WEFM* regime licensees have been aggressive in developing diverse entertainment formats." 610 F.2d at 851, FCC App. 25a.

Finally, the court emphasized the narrowness of the Commission's powers under *WEFM*, a limitation which falls well within the First Amendment broadcast decisions of this Court. It reiterated that the Commission

> merely has the power to take a station's format into consideration in deciding *whether to grant certain applications*. It has no authority under *WEFM* to interfere with licensee programming choices: it cannot restrain the broadcasting of any program, dictate adoption of a new format, force retention of an existing format, or command provision of access to non-licensees. To say that it is empowered to impose censorship or common carrier obligations is to stretch *WEFM* virtually beyond recognition.

*WNCN, supra*, 610 F.2d at 851-52, FCC App. 25a-26a.

[49] *Red Lion, supra*. See discussion at pp. 73-76 *infra*.

## SUMMARY OF ARGUMENT

As the Statement of the Case demonstrates, the Commission's *Policy Statement* and its ten-year format policy represent an aberration from its otherwise clearly understood statutory obligations. For although the Commission admits that diversity of programming is a critical component of the Act's public interest standard, although it routinely applies that public interest criterion in other proceedings where only licensees and potential licensees are parties, and although it recognizes that the marketplace does not work perfectly in producing or protecting diversity, the Commission has unequivocally refused to even *look* at the impact on the public interest in diversity in renewal or transfer situations where the abandonment of a unique, financially viable entertainment format is proposed, choosing instead to abdicate this statutory obligation to "marketplace forces."

Whether the Commission's refusal to perform its statutorily mandated obligation is based on honest misunderstanding, or to an ultimate antipathy to Chief Justice Burger's *UCC* opinions, the Court of Appeals was clearly correct in setting aside the *Policy Statement* on a number of relatively narrow, and legally unexceptionable grounds.

In applying the standards of judicial review required by the Administrative Procedure Act, the court properly interpreted both the statute and the Constitution, and found the *Policy Statement* invalid as "short of statutory right," 5 U.S.C. § 706(C), "arbitrary, capricious . . . or otherwise not in accordance with law," 5 U.S.C. § 706(B), and suggested, although it did not reach the issue, that the *Policy Statement* had also been enacted "without observance of procedure required by law," 5 U.S.C. § 706(D) (Point I, *infra*).

The Court of Appeals premised its § 706(C) determination on the Commission's clear abdication of statutory obligation to make a public interest determination concerning the impact on diversity of the



loss of a unique format under specific, limited circumstances, in individual renewal and transfer proceedings (Point I [A], *infra*).

The court found the *Policy Statement* arbitrary and capricious because of its reliance on contentions which were entirely unsupported, and which the Commission later abandoned, its misreading and exaggeration of the format decisions to which it purported to respond, its failure to seek ways to implement the prior, legally binding format decisions of the court, and its reliance on staff studies which had never been made available for public comment (Point I [B], *infra*).

At least one Circuit Judge would have set the *Policy Statement* aside solely on the ground that undisclosed and unrebutted reliance on the staff studies violated § 553 of the A.P.A. and due process of law. Respondents urge this as an alternative ground for affirmance (Point I [C], *infra*).

The Court of Appeals determination that the Commission must make the requisite public interest determination in unique format cases was not based on the court's policy views (which did not, in any event, substantially differ from those of the Commission), but on an analysis entirely grounded in the Act (Point II [A], *infra*).

The decision of the Court of Appeals was entirely in accord with, and indeed compelled by the Commission's own, otherwise consistent interpretations of the Act, and those of this Court and the legislative history (Point II [B], *infra*).

The Court of Appeals decision was also entirely consistent with, and again compelled by the paramount First Amendment rights of listeners, as defined in this Court's *Red Lion* decision (Point III [B], *infra*). The Petitioners' attempt to impose a non-broadcast oriented "least drastic means" test is inappropriate

and impermissible, since it would effectively require overruling *Red Lion*, whose continued vitality is not, and ought not to be in doubt (Point III [A], *infra*).

The Petitioners' contentions that the format decisions chill licensee program discretion ignore this Court's prior decisions, and the public trusteeship concept of the Act (Point III [C], *infra*). Similarly, the Court's decision does not violate § 326 of the Act (Point III [D], *infra*), nor is it, by any test, void for vagueness (Point III [E], *infra*).

Finally, the importance of the format cases on both First Amendment and statutory public interest grounds is most clearly exemplified in the area of unique foreign language formats whose unexamined abandonment would be not only statutorily impermissible, but profoundly antidemocratic (Point III [E], *infra*).

## POINT I

### The Court of Appeals Applied the Appropriate Standard of Judicial Review, and Properly Found the Commission's Policy Statement Unlawful

Under the Administrative Procedure Act, a court reviewing an agency decision is specifically empowered, and indeed required to "decide all relevant questions of law, [and] interpret constitutional and statutory provisions . . ." 5 U.S.C. § 706.

In addition, it is required to

> hold unlawful and set aside agency actions which are
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> • • •



> (C) in excess of statutory jurisdiction, authority or limitations or short of statutory right;
>
> (D) without observance of procedure required by law.

*Id.* This Court's decision in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 413 (1971), makes clear that these three provisions are separate standards, and that informal agency rulemaking must comply with all of them. Here it complied with none.

The court below specifically and correctly invalidated the Commission's decision under two of these grounds, (A) and (C) above, and indicated that it was not necessary to rely on (D) only because the other grounds were so compelling.[50] Far from usurping the Commission's authority or policy-making power, the court acted in a matter entirely consistent with, and indeed compelled by the A.P.A.

### A. The Commission's Decision Was "in excess of statutory jurisdiction [or] -- short of statutory right"

As already briefly discussed, the relevant sections of the Communications Act require the Commission to make a public interest determination in a number of situations, and to hold a hearing where there are disputed facts upon which such determination must be made. This is, in fact, precisely what the D.C. Circuit held in *WEFM* and again below.

The decision below is, in fact, nothing more than a straightforward implementation of the regulatory scheme which Congress adopted in the Radio Act of 1927 and later the Communications Act of 1934, and which this Court has articulated in over forty

---

[50] Judge Bazelon would have reversed on the procedural ground alone. 610 F.2d at 858, FCC App. 41a (concurring opinion). *See also* note 92 *infra*.

years of decisions. The holdings of those decisions have clearly and consistently reiterated that Congress rejected reliance on competition alone as the basis for allocation and exploitation of the electromagnetic spectrum.[51]

Instead, as this Court has also repeatedly held, Congress enacted a comprehensive regulatory scheme based upon licensing the use of radio frequencies. The licensing scheme imposed an obligation on the Commission to make choices among prospective licensees,[52] and to regulate those licensees consistent

---

[51] *E.g., RCA, supra*, 346 U.S. at 93-94, 97. *See* discussion at pp. 4-5 *supra*.

[52] *See, e.g.*, Mr. Justice Frankfurter's oft-quoted metaphor:

> The Act itself establishes that the Commission's powers are not limited to the engineering and technical aspects of regulation of radio communication. Yet we are asked to regard the Commission as a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other. But the Act does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic. The facilities of radio are not large enough to accommodate all who wish to use them. Methods must be devised for choosing from among the many who apply. And since Congress itself could not do this, it committed the task to the Commission.
>
> The Commission was, however, not left at large in performing this duty. The touchstone provided by Congress was the "public interest, convenience, or necessity."

*NBC v. U.S., supra*, 319 U.S. at 215-216.



with the "public interest, convenience and necessity."[53]

In sum, the Act prohibits the Commission from totally relegating the public interest determination to the marketplace, and specifically imposes upon it the duty of making a public interest determination, including holding a hearing, where necessary, when it considers each individual license application. As this Court has written,

> In each case that comes before it the Commission must still exercise an ultimate judgment whether the grant of a license would serve the "public interest, convenience or necessity."

*NBC v. U.S., supra*, 319 U.S. at 225.[54]

---

[53] As early as 1928 the Federal Radio Commission, the predecessor of the present Commission, wrote:

> Since the number of channels is limited and the number of persons desiring to broadcast is far greater than can be accommodated, the commission must determine from among the applicants before it which of them will, if licensed, best serve the public. In a measure, perhaps, all of them give more or less service. Those who give the least, however, must be sacrificed for those who give the most. The emphasis must be first and foremost on the interest, the convenience, and the necessity of the listening public, and not on the interest, convenience, or necessity of the individual broadcaster or the advertiser.

Federal Radio Commission, *Second Annual Report* 269-70 (1928), quoted with approval in *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 139 n. 2 (1940) ["Pottsville"].

[54] This has, until the format cases, been the Commission's consistent position, demonstrating its clear understanding of its statutory obligation. The Commission's brief in the early *Pottsville* case is illustrative. The Commission wrote:

> The one constant factor in all [licensing] cases is the requirement that the Commission must act upon every application filed, and must in its action on the application grant or deny as required by the statutory criteria.

Brief for Petitioner at 16, *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940).

The Commission's refusal to abide by the procedures required by the statute -- a refusal to even "look" at the effect on diversity of the loss of a unique format -- is thus a decision both beyond its statutory power and one which is not within, or "short of" statutory right.[55]

Whatever the standard of judicial review where agency action is claimed to be "arbitrary and capricious," there is no requirement of deference to agency determinations as to the law itself, *e.g., Superior Oil Co. v. Udall*, 409 F.2d 1115, 1119 (D.C. Cir. 1969) (Burger, J.). *Cf. Midwest Video II.*[56] Quite the contrary, under both the separation of powers, and the statutory scheme of the A.P.A., reviewing courts are and must be the final arbiters of statutory construction.[57]

Prior decisions from this and other courts which define the Commission's statutory obligations illustrate the A.P.A.'s requirement that the reviewing

[55] See the more extensive discussion of the statutory basis for the decision at Point II *infra*.

[56] It is significant that in cases like *Midwest Video II*, as well as its predecessor cable cases, *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968) and *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972) [*Midwest I*], or other cases defining the Commission's statutory power, *see e.g., National Association of Theatre Owners v. FCC*, 420 F.2d 194 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1970) (upholding power to authorize subscription television), there is virtually no discussion of the standard of judicial review or of deference to the agency's views. Clearly in all those and many similar cases, it is for the court, and the court alone, to decide what the statute means and what it permits.

[57] Statutory construction, and the means by which a statute is to be implemented are, of course, entirely different matters. The various petitioners labor mightily to turn this case from the former to the latter, *see e.g.*, FCC Br. 33-35; ABC Br. 35, 62-70, but they are ultimately unsuccessful, since the issue is not a difference in opinions between the Commission and the court as to whether unique formats are in the public interest -- (*see* pp. 9-10 *supra*, (both agree they are) -- but rather, the Commission's "opinion" that it shouldn't be required to follow statutory requirements in such cases because someone else -- advertisers -- will do its work for it.



court "will . . . decide and interpret statutory provisions," *e.g., Ashbacker*; *FCC v. National Broadcasting Co. (KOA)*, 319 U.S. 239 (1943) [*FCC v. NBC (KOA)*]; *Citizens Communications Center v. FCC*, 447 F.2d 1201 (D.C. Cir. 1971) and *UCC I*,[58] which is precisely what the Court of Appeals has been doing since *Atlanta*, and through the decision below. This is no usurpation of agency function -- rather it is a restatement by the court of the agency's legal obligation to make its own independent public interest determination in each case which comes before it. *See, e.g., WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).[59]

## B. The Commission's Decision Was Arbitrary and Capricious

The generally accepted standard for judicial review of agency action attacked as "arbitrary and capricious" is that such action may be upheld only if it is "reasonable." *See, e.g. Permian Basin Area Rate Cases*, 390 U.S. 747, 800 (1968). This in turn requires some analysis of the record to determine, *e.g.*,

[58] Each of these cases involved interpretation of statutory provisions requiring hearings (*Ashbacker* and *Citizens Communications Center v. FCC, supra*) or the right to participation in a hearing with attendant standing to appeal (*FCC v. NBC (KOA)* and *UCC I*). An examination of the Commission's briefs in all those cases reveals no contention that the court's reading of the statute would not be binding on the Commission. Indeed, after each decision the Commission followed the court's statutory interpretation.

[59] In this respect, this Court's decision in *NCCB* supports, rather than undermines the decision below. In *NCCB* the Commission refused to adopt a retroactive, across-the-board rule, which the Court of Appeals would have required. Instead, the Commission, as upheld by this Court, left open the opportunity for parties to raise -- and the Commission to decide -- the public interest diversity implications of individual license renewal applications by "grandfathered" licensees. *Id.*, 436 U.S. at 810, 811.

what questions the agency asked (to determine the reasonableness of the answers), whether there is record support, etc. This Court has held that a court should not hesitate to undertake a "thorough, probing, in-depth" review of the rulemaking record to determine whether, *inter alia*, the agency failed to resolve the substantive issues before it in a rational fashion. *Citizens to Preserve Overton Park v. Volpe*, *supra*, 401 U.S. at 415.

The Court of Appeals, reviewing the Commission's decision and the record in the *Inquiry*, found a number of factors which "cast serious doubt on the rationality and impartiality of [the Commission's] action." *WNCN*, *supra*, 610 F.2d at 846, FCC App. 14a. The major factors[60] were:

> 1) The contention that enforcing *WEFM* would be an "administrative nightmare." *Id.*[61] FCC App. 14a.[61]
>
> 2) The continued exaggeration and "drastic" misreading of *WEFM* and other format decisions which provided the springboard for the *Inquiry* and *Policy Statement*, *Id.* at 850, FCC App. 23a.[62]

[60] The court noted other failures, including the absence of any evidence that the format cases deterred licensees from experimenting with new formats. Rather, as the court pointed out, the Commission's own evidence showed that broadcasters had been aggressive in developing diverse entertainment formats. *WNCN*, *supra*, 610 F.2d at 851, FCC App. 25a.

[61] A sub-category of this was the Commission's repeated statements of its inability to classify formats, and especially to know a "unique" format when it saw one. *See* discussion at pp. 37-38 *infra*.

[62] This is perhaps best understood by a simple analogy. If the court had ruled that the statute required red apples, and the Commission had read that decision as requiring blue apples, an inquiry into blue apples, while *internally* rational, would be inherently *irrational* since blue apples were never the issue. Further, a decision stating that the Commission couldn't or wouldn't find blue apples, even if supported by the record, bears no relationship to the statutory requirement of red apples, and so is also irrational.



> 3) The clear refusal to seek ways of enforcing the limited mandate of *WEFM* and other format cases, *Id.* at 852-53, FCC App. 27a-28a, and refusal or failure to look at proposals made by parties[63] and others.
>
> 4) Reliance on undisclosed material[64] which, in addition, did not actually support the Commission's position.

Each of these grounds, as the court's opinion carefully demonstrates, provides adequate basis for setting aside the Commission's decision under the arbitrary and capricious standard; cumulatively they compel the result ordered by the court.[65]

### *1) The Administrative Nightmare Argument*

One of the grounds relied upon by the Commission in its ultimate refusal to look at the loss of unique formats in even the most limited situations[66] was its fear of the burden upon it, and the "delay and inconvenience" to the broadcast industry which holding the hearings required by *WEFM* would cause. *Policy Statement*, 60 F.C.C.2d at 864, FCC App. 131a.

[63] This is also a part of the "hostility" to "public intervenors" which was condemned in *UCC II*, *supra*, 425 F.2d at 548, 550, and which was a factor in finding the Commission's decision there unsupportable and unlawful under the A.P.A.

[64] This ground, which the court saw as going to the irrationality of the Commission's decision, is separately discussed *infra* as a ground for reversal under § 706(D) and so will be only briefly included within this subpoint B.

[65] This is not unlike the decision in *UCC II* where Mr. Chief Justice Burger found a variety of factors to have damaged the record in that proceeding "beyond repair," 425 F.2d at 550, requiring that the order be totally vacated.

[66] *I.e.*, after there had been significant public grumbling, and a prima facie showing of both uniqueness and financial viability.

The Court of Appeals correctly found that the "administrative nightmare" posed by the Commission was "little more than a dream," *WNCN*, *supra*, 610 F.2d at 848, FCC App. 18a, based on its review of the history of format litigation,[67] and on the truthful, if somewhat belated concessions made by counsel for the Commission at oral argument.[68]

The Commission's characterization and discussion of the hearing held in *WEFM* itself similarly shows a certain lack of candor, and undercuts any reliance placed on it by the *Policy Statement*. The Commission disingenuously characterized that hearing as "fairly typical of format abandonment hearings," *Policy Statement*, 60 F.C.C.2d at 864, FCC App. 131a; in fact, it is the only one ever held![69] In addition, the

---

[67] As the court pointed out, in ten years "a mere handful" of format cases had reached that court, *WNCN*, *supra*, 610 F.2d at 848, FCC App. 19a, and, according to the Commission, "perhaps half a dozen" petitions to deny based on format issues were pending at the time of argument, *id.* at 849, FCC App. 19a-20a. This comports precisely with respondents' understanding: sadly many unique formats disappear without the requisite public grumbling, or without organized citizens groups to protest their demise. For example, in 1977 Baltimore, Maryland lost its only classical music station, WCAO-FM. *Compare* BROADCASTING YEARBOOK 1977, at C-95, *with* the same source one year later at C-98. In 1973 Allentown, Pennsylvania lost its only source of classical music on WFMZ. *Compare* BROADCASTING YEARBOOK 1973, at B-166 *with* BROADCASTING YEARBOOK 1974, at B-175. In those and many other instances, no challenge has been filed, under *WEFM*, the Commission is thus not required to consider the issue.

[68] Counsel conceded the administrative nightmare argument was an "exaggeration" and "not very significant at all." *WNCN*, *supra*, 610 F.2d at 849, FCC App. 20a.

[69] Additionally, although the Commission does not mention it, the hearing considered a number of issues beside the uniqueness of the format and its financial viability, even assuming the Commission's time estimates were correct, much of that time was not attributable to the format issues. *See Zenith Radio Corp.*, 56 F.C.C.2d 1095 (1975).



accuracy of the time estimates even of that singular occurrence is, by the Commission's own admissions elsewhere, in doubt,[70] although the *Policy Statement* nowhere admits that such is the case. Finally, the Commission ignored the fact that every year it holds numerous hearings, all ultimately going to the question of whether the public interest is being or will be served, and that even the allegedly typical and overwhelming *WEFM* hearing was "less extensive than the typical comparative renewal proceeding."[71]

Although the Commission discussed the issue separately, its continued insistence that it would be impossible to determine if a format is unique because "[w]hat makes one format unique makes all formats unique," *Policy Statement*, 60 F.C.C.2d at 862, FCC App. 127a, also may be considered part of its irrational, or arbitrary and capricious reliance on the "administrative nightmare" argument. As previously discussed, the Commission makes judgments based on its evaluation of formats as "specialized" or even as "unique" in a number of other contexts including

---

[70] The reliability of the figures set forth in the *Policy Statement* was undermined when the Commission, responding to an FOIA request for data and memoranda pertinent to this statement, replied that "there were no written or documented studies as to the amount of time devoted to the WEFM proceedings, rather, the information in the Memorandum Opinion and Order was based on oral estimates given during the hearing by the Administrative Law Judge and participating Broadcast Bureau counsel." *Citizens Communications Center*, 61 F.C.C.2d 1017, 1018 (1976).

[71] *WNCN*, *supra*, 610 F.2d at 849, FCC App. 19a, citing Note, *Judicial Review of FCC Program Diversity Regulation*, 75 Colum. L. Rev. 401, 406 n. 33 (1975). *See also* Wall, *Section 309 of the Communications Act: The Renewal Provision - A Need for Change*, 25 Admin. L. Rev. 407, 412 (1973).

license grants,[72] cable TV distant signal importation,[73] and waivers of nighttime allocation rules.[74] Thus the Commission's claimed inability to do in format loss situations what it routinely does elsewhere is yet another ground "cast[ing] serious doubt on the rationality and impartiality of its action." *WNCN*, *supra*, 610 F.2d at 846, FCC App. 14a.

### *2) Exaggeration and Misstatement of the D.C. Circuit's Format Decisions*

As the Circuit Court noted:

> Throughout the format controversy, the Commission has displayed a deep-seated aversion to the decisions of this court (and to the advocates of those decisions) while at the same time misinterpreting and exaggerating their meaning.

*WNCN*, *supra*, 610 F.2d at 849, FCC App. 21a. Although the Commission actually began its *Inquiry* with a correct statement of the *WEFM* holding,[75] it immediately distorted that narrow holding[76] by imputing to it a "require[ment] [of] close scrutiny of broadcast entertainment formats," *Notice of Inquiry*, 57 F.C.C.2d at 582, FCC App. 65a, which would require a "system of pervasive governmental regulation," *Id.* Rather than looking, in limited renewal or transfer situations,

---

[72] *See, e.g. George E. Cameron Jr. Communications*, *supra*, indicating a change in policy which limits designation of a standard comparative issue on programming to the proposal of *unique* formats, not simply specialized issues. *See also Flint Family Radio*, *supra*.

[73] 47 C.F.R. § 76.59(kk) (1977). *See Specialty Stations, CATV First Report and Order* 58 F.C.C.2d 442, 452-53 (1976).

[74] *See, e.g. International Radio, Inc.*, *supra*.

[75] *See Notice of Inquiry*, 57 F.C.C.2d at 581-82, FCC App. 64a-65a, quoting *WEFM*. *See also Policy Statement*, 60 F.C.C.2d at 858, FCC App. 118a.

[76] An equally pervasive error is the continual mischaracterization of the decision – continued through the briefs in this case – as one of policy, rather than of statutory construction. *See e.g. WNCN*, *supra*, 610 F.2d at 854-55, FCC App. 32a.



at whether the public interest would be served by the loss of a unique, financially viable format, the Commission saw the *WEFM* decision as somehow requiring it to distribute[77] or allocate formats within a market.[78] This total mischaracterization of the narrow and limited *WEFM* holding[79] inexplicably persists through the briefs filed in this Court, demonstrating a similar misreading of the *WNCN* decision.[80]

As the D.C. Circuit held in a slightly different context:[81]

> a regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist.

*Home Box Office, Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977) [*HBO*], citing *City of Chicago v. FPC*, 458 F.2d 731, 742 (D.C. Cir. 1971).

Here, of course, the Commission's decision actually violated its statutory mandate; additionally though, it responded to problems that did and do not exist, and tilted at a windmill of "pervasive regulation"

---

[77] *See, e.g.* Separate Statement of Chairman Wiley in the *Notice of Inquiry*, 57 F.C.C.2d at 586, FCC App. 74a, 74a-75a.

[78] The leading proponent of this view was Commissioner Robinson. *See, e.g.*, his concurring statement, *id.* at 589, 600-01, FCC App. 82a, 198a.

[79] This is particularly surprising since the Circuit Court went out of its way to reiterate the narrowness of its holding and to once again dispel the Commission's oft-stated, but legally unsupported fears. *WNCN*, *supra*, 610 F.2d at 851-52, FCC App. 25a-26a, previously quoted at p. 25 *supra*.

[80] *See, e.g.* ABC Br. 11, 18 n. 44, 40 n. 100, 66; FCC Br. 22, 43 n. 28.

[81] There the question was whether the Commission had amassed any evidence to support its decision to *protect* certain specified kinds of programming – *i.e.*, movies, sports and series shows – on commercial television, by prohibiting their exhibition on pay cable. The antithetical quality of the Commission's opposing and inconsistent positions on the anti-siphoning rules and the format cases did not go unnoticed by the court. *HBO*, *supra*, 567 F.2d at 29.

which was and is not there, rendering its "solution" to the *WEFM* problem unnecessary and irrelevant, as well as "arbitrary and capricious" within the meaning of the A.P.A.[82]

### 3) *Failure to Consider Means of Implementing WEFM*

Closely related to the Commission's "pervasive" mischaracterization of the format decision was its "failure to implement the cases so as to minimize their drawbacks while preserving their essence." *WNCN*, *supra*, 610 F.2d at 852, FCC App. 27a. The *Inquiry* graphically illustrates this fact.

Although the Commission asked a number of specific questions[83] about how *WEFM* might be implemented[84] if it were to be followed, and although the

---

[82]Judge Leventhal issued a concurring opinion on precisely this point. He wrote:

> If hostility to a result leads an agency systematically to distort the testimony of witnesses on material matters, a court could not conscientiously sustain the agency decision. That is not unlike what the Commission has done in this case by distorting the meaning of our *WEFM* opinion, a matter Judge McGowan develops with some care. The court-agency partnership depends on mutuality of respect and understanding.

*WNCN*, *supra*, 610 F.2d at 860, FCC App. 45a (concurring opinion of Leventhal, J.) (footnotes omitted).

[83]The questions, including inquiry relating to how to define formats, how much public grumbling is necessary, etc., appear in the *Notice of Inquiry*, 57 F.C.C.2d at 584-85, FCC App. 70a-71a, and are reproduced in *WNCN*, *supra*, 610 F.2d at 844, FCC App. 9a n. 14.

[84]Those questions were directed only to "parties who favor some degree of government involvement," *Notice of Inquiry*, 57 F.C.C.2d at 584, FCC App. 69a, a hardly encouraging invitation, since the Commission had already clearly expressed its antipathy toward any such involvement.



answers to those questions would have alleviated the Commission's fears of administrative nightmares,[85] chilling effect on licensee innovation,[86] the requirement of pervasive regulation,[87] and the like, the Commission clearly never even looked at the proposed answers, having decided at the outset that "the course charted by the Court may lead only to expense, delay and stagnation . . . ." *Notice of Inquiry*, 57 F.C.C.2d at 584, FCC App. 69a.

The Commission's failure to seriously consider material before it,[88] especially where that material would have aided it in implementing rather than disobeying the binding statutory interpretation[89] of the Court of Appeals is yet another indication of the Commission's arbitrariness in the proceeding,[90] and in the resulting irrationality and insupportability of its decision.

---

[85]For example, the Comments of the WNCN Listeners Guild suggested clear guidelines for when hearings should be held by a quantification of the requisite public grumbling, how burdens should be apportioned, how financial viability could be resolved, and the like. *See* JA 206-225.

[86]The Guild, among others, has always been willing to accept a Commission-defined "grace period" for experimentation with new formats so that a licensee could feel free to engage in such experimentation for some period of time – perhaps a year or 18 months – before the *WEFM* decision would come into play.

[87]Given the extremely limited number of hearings which would have occurred under, *e.g.*, the Guild's proposals, *see* note 85 *supra*, the Commission could hardly worry about "prevasive regulation."

[88]As the court below pointed out, the Commission "has not suffered from the want of suggestions" on how to do so, citing the abundance of scholarly comment and Commissioner Hooks' concurring statement in the *Notice of Inquiry*, *WNCN*, *supra*, 610 F.2d at 852 & n. 38, FCC App. 28a & n. 38, as well as the comments filed in the *Inquiry*, *id.* at 850 n. 33, FCC App. 23a-24a n. 33.

[89]A court's interpretation of the statute under which an agency operates is, of course, thereafter binding on the agency. *See, e.g.*, *Allegheny General Hospital v. NLRB*, 608 F.2d 965, 969-970 (3d Cir. 1979).

[90]As the court found, rather than formulating appropriate and workable rules, the Commission simply "threw up its hands." *WNCN*, *supra*, 610 F.2d at 853, FCC App. 28a.

***4) Reliance on Undisclosed Material***

The court found that the Commission's reliance on the undisclosed secret studies, see discussion, *infra*, cast doubt on the rationality of its decision since, *inter alia*, those studies were never subject to comment, analysis or refutation. *WNCN*, *supra*, 610 F.2d at 846-47, FCC App. 14a-17a.

The decision below, casting the Commission's procedural errors under the arbitrary and capricious standard, is consistent with this Court's holding that the "adequacy" of a record to support an agency's findings

> turns on whether the agency has followed the statutory mandate of the Administrative Procedure Act or other relevant statutes.

*Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council*, 435 U.S. 519, 547 (1978) [*Vermont Yankee*].

This emphasis on procedural defect as negatively affecting substantive result is supported by the leading commentator on administrative law, who has recently written:

> Substance and procedure are not cleanly separable; they often overlap. What is procedurally bad may for that reason be substantively bad. For instance, when an agency failed to make its study public until after the close of the comment period, a court found lack of substantial evidence in support of the rule because, the court said, some of the evidence was "not exposed to the full public scrutiny which would encourage confidence in its accuracy." *Aqua Slide 'N' Dive Corp. v. Consumer Products Safety Commission*, 569 F.2d 831, 842 (5th Cir. 1978).



Davis, *Administrative Common Law and the Vermont Yankee Opinion* 1980 Utah L. Rev. 3, 16.[91]

## C. The *Policy Statement* Is Invalid Because It Was Enacted in Violation of Statutory Procedure and Due Process Law

While the court below did not find it necessary to rest its decision on the procedural errors in the *Inquiry*,[92] it is clear that under well settled law those errors are sufficient, in and of themselves, to require invalidation of the *Policy Statement* under § 706(D).[93]

---

[91]Although Davis's article suggests ways to read this Court's *Vermont Yankee* decision so as to preserve, *inter alia*, a court's ability to review procedural irregularities in general, such a reading is not necessary here where the defects clearly violate the A.P.A. and fall squarely within the language of *Vermont Yankee*. See pp. 50-53 *infra*.

[92]The court saw no need to decide the question because the procedural violations were also symptomatic of the arbitrariness with which the Commission acted throughout. *WNCN*, *supra*, 610 F.2d at 847 n. 24, FCC App. 17a n. 24. Judge Bazelon, however, issuing a concurring opinion, wrote:

> The Commission's failure to make public the staff study that proved so central to its final decision violates fundamental rulemaking principles. As the majority opinion documents, the FCC exhibited an almost cavalier disregard for the public's right to comment on the critical data and methodology supporting the Commission's finding that 'market forces had provided a significant even if not perfect amount of diversity.' This conclusion in turn is a vital link in the Commission's reasoning underlying its adoption of the *Policy Statement*. I believe therefore that the record must be reopened to permit meaningful public participation in the Commission's decision.

*WNCN*, *supra*, 610 F.2d at 858, FCC App. 41a (concurring opinion).

[93]We do not understand this Court's decision in *Vermont Yankee* to affect or limit § 706(D). The holding that agencies are not required, as a general matter, to employ procedures *beyond* those required by the A.P.A. in no way implies that a reviewing court need not be assured that § 553 was complied with. Rather, *Vermont Yankee*'s almost *sole* reliance on the procedures provided by the A.P.A. makes it even more critical that the agency provide, and the court scrupulously review, adherence to the statute.

Of the many violations of the A.P.A. and due process, and the continued "hostility and indifference" to the public interest groups,[94] the inclusion of, and reliance on studies whose existence was unknown prior to the decision, and which were *never* subject to public analysis or rebuttal, stands out.[95] To understand the significance of the studies and the direct A.P.A. violation which their use entailed, it is necessary to review briefly the procedural record below.

---

[94]For example, no motions for extensions of time clearly needed by understaffed and underfinanced citizens' groups were granted, while all requests for procedural relief made by broadcasters were. This was particularly acute in the matter of reply comments; since most out-of-town citizens' groups were unable to go to Washington to review the contents of comments which had been filed, they requested a brief extension until shortly after the scheduled publication of the issue of *Access* magazine which was to summarize those comments. The motion was denied, and, as a result, not one out-of-town group filed reply comments, though virtually all the broadcasters and industry groups did. *See also* note 104 *infra* for more examples.

[95]Commissioner Fogarty, dissenting from the Commission's decision to petition for *certiorari* in this case, wrote:

> the procedural infirmity inherent in the Commission's failure to afford notice and opportunity for comment on the so-called OPP "Secret Study" is a fatal flaw.
>
> • • •
>
> The failure to give public notice and opportunity for comment on the OPP study was not merely harmless error; that failure goes to the integrity and fairness of the Commission's decision-making process.

Fogarty dissent, WNCN Opposition to Petitions for Certiorari, Appendix A, at 1a-2a.



### *1) The Secret Studies*

Shortly after the *Notice of Inquiry* was issued, Citizens Communications Center [Citizens] filed a pleading[96] calling upon the Commission to carry out or contract for a study which would provide empirical data on existing formats, changes which had occurred before and after *Atlanta* and *WEFM*,[97] ownership and finances of radio stations in the major markets, and other information critical to the *Notice*'s assumptions[98] and the Commission's ultimate determination.[99]

---

[96]This was the Petition to Reconsider, Rescind, Suspend or Redirect Inquiry, JA 145. It pointed out that the *Inquiry* was no more than an attempt to overturn the Court of Appeals' decision by appealing it not to this Court or Congress, but to the broadcasters. In addition to the request for an empirical study, it asked, *inter alia*, for the Commission to "undertake affirmative measures to involve local participants" which, of course, the Commission never did. (JA 145 *et seq.*)

[97]Such information was and is critical to the Commission's oft-stated, but thus far unsupported belief that the existence of the format decision stifles and deters licensee experimentation with new formats.

[98]Citizens pointed out what has remained a major flaw in the Commission's blind reliance on untested marketplace economics. It wrote:

> the Commission relies on a marketplace theory of format changes, but provides no data on the workings of the marketplace. How many multiple-owned radio stations operate at a loss? What is the extent of inefficient diversity - wasting AM-FM duplication in cities where format changes are under protest? How can deference to a selective ratings system controlling the format marketplace be reconciled with the public interest standard? How do non-commercial stations fit into the marketplace?

(JA 156.)

[99]In the alternative, Citizens asked for sufficient time to allow listeners to conduct such studies themselves to the extent that resources and information were available to them. It also requested reimbursement to such groups if the Commission declined to make or contract for the requisite studies.

In denying that pleading, the Commission clearly stated its view that no such study was necessary.[100]

Citizens then filed a Freedom of Information Act [FOIA] request for data underlying the assumptions in the Commission's *Notice of Inquiry*. The response was essentially that there was no such data (JA 52).[101]

When, however on July 30, 1967, the Commission finally issued its *Policy Statement*, the Commission relied heavily[102] on two "staff studies" which purported to demonstrate the adequacy of the marketplace in providing "a bewildering diversity of formats" and in providing maximum "consumer satisfaction."[103] The conclusion of the studies was attached as an exhibit to the *Policy Statement*, 60 F.C.C.2d at 872-81, FCC App. 156a-170a, but the data from which it was derived was not.

The existence of these studies, much less the probability that the Commission would rely on them,

---

[100]The Commission left open the possibility of calling for such a request after all the comments were in, if those comments did not provide satisfactory data upon which to make a decision (JA 169).

[101]The *Notice* had included an Appendix purporting to show the diversity of formats existing in three major markets; the FOIA response explained that this "data" was obtained from BROADCASTING YEARBOOK, an industry publication. Even this incredibly limited and inherently meaningless "data" was inaccurate. As Citizens pointed out, the list failed to include an all-jazz format in New York after the Commission had been asked to review a transfer application seeking to abandon that very unique format! (JA 155).

[102]The Commission's reliance on the studies is demonstrated not only in the *Policy Statement*, 60 F.C.C.2d at 863, FCC App. 129a, but in its denial of reconsideration as well, 66 F.C.C.2d 67, 84-85, FCC App. 176a, 189a-192a. Judge Bazelon saw the studies as a "vital link in the Commission's reasoning underlying its adoption of the *Policy Statement*," *WNCN*, *supra*, 610 F.2d at 858, FCC App. 41a, and the majority likewise sees the studies as "ha[ving] a major influence on the decision," *id.* at 846, FCC App. 14a. *See* the court's discussion of this issue at 610 F.2d 846-47, FCC App. 14a-17a.

[103]*See* note 45 *supra*.



had been entirely unknown prior to the issuance of the *Policy Statement*. This critical point was made by the Guild in a petition for reconsideration[104] which requested an opportunity to respond to the studies once the underlying data was made available.

Simultaneously, Citizens filed an FOIA request for that data so that the public might be able to anaiyze and criticize the studies and their conclusion (JA 68.)[105] Citizens also wrote to the Commission requesting that the *Inquiry* be reopened until the FOIA request was resolved, and the public given an opportunity to comment (JA 70).

Although the Commission responded to the FOIA request by turning over numerous pages of virtually unintelligible computer print-outs,[106] it did so sub-

---

[104]The Commission allows petitions for reconsideration to be filed within 30 days of a decision. 47 CFR § 1.106(f) (1978). The standard of persuasion on such petitions, is by regulation, far greater than in the initial proceeding. 47 CFR § 1.106(c) (1978).

Nevertheless, a number of groups asked the Commission to reconsider its decision, some on the ground that although they were vitally interested in the issue, had valuable and relevant information and insights to offer, they had not even known of the existence of the *Inquiry* until the decision was announced. *See, e.g.*, JA 381. Their requests were, of course, ultimately denied.

Other petitioners for reconsideration alleged that their timely comments had never been considered and did not appear on the list of "Parties Filing Comments" attached to the *Policy Statement* (JA 392), or that the Commission had failed to send a copy of the *Notice of Inquiry* although specifically asked to do so (JA 350).

[105]The FOIA request asked for

> any materials which show the date on which the study was first requested within the Commission, the circumstances surrounding such institution of the study, and the dates covered by the study.

(JA 68).

[106]In a subsequent letter to the Commission, Citizens pointed out that the material furnished was totally useless in and of itself (JA 100), a fact with which the Court of Appeals, viewing the print-outs (JA 76-87), quite reasonably agreed.

stantially after the time for filing petitions for reconsideration had passed.[107] Citizens appealed the overly limited response to its FOIA request,[108] and on November 24, 1976 the Commission denied the appeal.

In March of 1977, Citizens wrote the Commission stating that it and other public interest groups were entirely unable to do any analysis of the studies because

> the Commission failed to provide a directory to explain what the data in the computerized print-out means.

(JA 100).

Sometime thereafter, with the actual date the subject of extreme and unresolved controversy,[109] the Commission placed a "Description of the Data Base" in its files. It is, however, undisputed that this was done long after the time for filing for reconsideration was past; this time was never extended, since the

---

[107]The exact timing is not clear, as is the case with so many critical facts in this record. The Commission's "answer" is dated September 15, 1976 (2 weeks after the deadline for reconsideration) but the computer print-out material placed in its public file, reproduced in the Joint Appendix below, bears the date December 6, 1976 on every page (JA 76-87). All petitions for reconsideration were filed on or before August 29, 1976.

[108]For example, the Commission declined to furnish any information about when the studies had been made, or who had made them (JA 73). *See* note 105 *supra*. The point of this request was, obviously, to determine whether the Commission had deliberately misled the public in its earlier denials.

[109]The Commission claims to have done this on March 30, 1977, and produced a letter to that effect at oral argument in the D.C. Circuit. The letter was not, however, part of the Appendix, and no one from Citizens had ever seen it prior to argument. No public interest group, including any of the respondents here, had ever seen the "Description" until the Commission placed it at the end of the second volume of the Joint Appendix. Significantly, the "Description" does not appear in the Certified List of Documents filed with the Court of Appeals in the late fall of 1977, after the Commission's final order denying reconsideration.



Commission refused to grant Citizens' previously described request to reopen or hold the *Inquiry* open until the studies had been commented upon.

Accordingly, no listener or public interest group was ever able to rebut or challenge[110] critical evidence relied upon by the Commission, although upon full examination the studies appear hopelessly methodologically flawed[111] with "data" which in no way supports the conclusions drawn by the staff and subsequently by the Commission.[112]

---

[110]Petitioners make much of the fact that the studies have not been rebutted or shown to be inaccurate, *see e.g.* FCC Br. 40; ABC BR. 36-37 n. 87, completely ignoring the fact that there has been no forum in which to do so. Since the necessary material was not available to make the appropriate "comment" during the pendency of the Commission's proceeding, there was no way, within the constraints of judicial review of an agency record, to submit rebuttal or criticism to the Court of Appeals. The Petitioners show either surprising ignorance or lack of respect for the most basic principles of appellate review by their unfounded and irrelevant criticism.

[111]First, the Commission violated the most fundamental scientific methods by failing to disclose the equation used as the basis of its statistical analysis, and upon which the outcome of its whole study was dependent. *See* H. Kelejian & W. Oates, INTRODUCTION TO ECONOMETRICS, 92-98 (1974). Without the equation, no interested party could assess the validity of the statistical results -- *i.e.* coefficients, standard errors, and F-statistics.

The Commission's method of data selection violated the most fundamental methodological requirement of empirical scientific study - that of random selection of data. Rather than selecting from a cross section of all radio markets, the Commission chose only the top 25, omitting all medium and small markets, thus invalidating any inferences concerning the general nature of the relationship between formats and audience size.

Finally, although the Commission's study included 147 stations, it obtained information about only 100. Any correlation between format types and audience shares lacks statistical validity where one-third of the stations are assigned a zero value for their audience shares. Significantly one of those stations for whom information was omitted was WNCN itself.

[112]*See* the court's discussion in *WNCN*, *supra*, 610 F.2d at 856-57, FCC App. 35a-37a.

### *2) Reliance on Undisclosed Material Violates § 553 of A.P.A.*

Where agencies engage in informal rulemaking, the applicable section of the Administrative Procedure Act, 5 U.S.C. § 553 requires a three-step procedure in agency rulemaking: notice to the public, an opportunity for interested parties to comment, and a decision based on "consideration of the relevant matter presented." Within this three-step procedure, the notion of fundamental fairness is entirely applicable, since

> the reviewing court must satisfy itself that the requisite dialogue between the agency and the public occurred and that it was not a sham. Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 Cornell L. Rev. 375, 381 (1974) [*Wright*].[113]

It is well settled that the "comment" requirement of Section 553 includes an opportunity to rebut, challenge or otherwise speak to all relevant material *prior* to the agency's decisions.[114] *See e.g., Wright, supra* at 379-81; Davis, *Administrative Law in the Seventies* (1976) § 601-1 (Supp. 1977); *United States v. Nova Scotia Food Products Corp.*, 568 F.2d 240, 249-52 (2d Cir. 1977); *Mobil Oil Corp. v. FPC*, 483 F.2d 1238, 1259-61 (D.C. Cir. 1973). *Cf. HBO, supra.*[115]

[113] The Wright article was cited with approval in *Vermont Yankee, supra*, 435 U.S. at 547 n. 20.

[114] This interpretation of the "comment" requirement of the A.P.A. in no way conflicts with *Vermont Yankee*. A footnote in that opinion is a statement by the Nuclear Regulatory Commission describing the procedures used, the fact that no evidentiary material would have been received under different procedures, and the further fact that the petitioner had made not even a suggestion of what other substantive matters it might develop under another procedure. Not only were all documents made available well in advance of the hearing, but the staff also made available its drafts and handwritten notes, *id.* at 530 n. 7.

Compare this with the deliberate withholding of information in the instant case.



Once data, or conclusions from data, or any study are "relied" upon by the agency, the participants must be furnished with that material as soon as it is practicably available, *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 391 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974), and must be given an opportunity to analyze and comment on the material as well as to challenge or otherwise comment upon the methodology employed in obtaining it. *E.g., International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 632 (D.C. Cir. 1973); *South Terminal Corp. v. EPA*, 504 F.2d 646, 664, 666 (1st Cir. 1974).

In the instant case, as the Court of Appeals more gently noted, the Commission flagrantly violated both the letter and the spirit of the A.P.A. -- as well as the most basic notion of due process -- by failing to reveal the information upon which it ultimately relied in making its determination. This fundamental error was exacerbated both by the Commission's repeated reassurances to public interest groups *prior*

[115] In *HBO* a divided panel of the Court of Appeals set aside an agency decision because of extensive *ex parte* contacts -- *i.e.* another form of "evidence" or information which might be considered by an agency without the opportunity for all interested parties to "comment." The rule against *ex parte* communications has been reiterated after the *Vermont Yankee* decision, *see e.g., United States Lines, Inc. v. Federal Maritime Commission*, 584 F.2d 519, 539 (D.C. Cir. 1978), thus firmly grounding it in the notice and comment requirement of § 553, *see* Stewart, *Vermont Yankee and the Evolution of Administrative Procedure* 91 Harv. L. Rev. 1805, 1816-17 n. 49. Other Circuits have adopted a similar interpretation.

to the decision that no studies were needed or contemplated,[116] and by its failure to provide necessary information to permit any meaningful comment on the studies *after* its decision.[117]

Respondents believe that under the A.P.A. and this Court's decision in *Vermont Yankee*, an agency decision may not be upheld where it has been made in a procedure so flagrantly violative of the statute and fundamental fairness.

It should also be recalled that in at least three of this Court's major communications law decisions, the issue of an improper or otherwise procedurally inadequate record has been lurking on the background[118] but has not required decision. Here, the situation is quite different.

In *Sanders Bros.* this Court noted respondent's contention that

> the Court used as evidence certain data and reports in its files without permitting respondent . . . the opportunity of inspecting them.

---

[116] These "reassurances" were made in response to various pleadings filed by the public interest groups. *See* p. 46 *supra*.

[117] No information about the studies was provided until after the period for filing reconsideration petitions had passed, although requests were promptly and properly made. The Commission refused to reopen the record to permit comment although specifically requested to do so and ultimately denied reconsideration, continuing to rely on the untested studies (FCC App. 183a, 191a). Compare this situation with that in *Vermont Yankee* where this Court wrote:

> ACRS was not obfuscating its findings. The reports to which they referred were matters of public record, on file in the Commission's public document room . . . not *one* member of the supposedly uncomprehending public even asked that the report be remanded.

435 U.S. at 556-557.

[118] This suggests, in an only slightly different context than that discussed in *UCC II*, that the Commission may be less than scrupulous in permitting interested parties to actually and effectively participate in its proceedings.



*Id.* at 477-78. Because the Commission disavowed the *use* of such materials *and* the Court of Appeals found the disavowal "veracious" this Court was not "disposed to distort its conclusion." Here, of course, the Commission does not disavow use, and the Court of Appeals found the Commission lacking in candor.

In *NCCB*, the Commission relied on a study based on an annual programming report which was not available at the time comments were filed. This Court wrote:

> The United States suggests that the Commission could not properly have relied on this study since it was not made available to the parties for comment in advance of the Commission's decision. Brief of United States 46 n. 39. No party petitioned the Commission for reconsideration on this ground, nor was the issue raised in the Court of Appeals or in any of the petitions for certiorari, and it is therefore not before us.

436 U.S. at 807 n. 27.

Here of course, the Guild petitioned for reconsideration on this ground, and not only raised the issue, but had it decided in its favor of the Court of Appeals.

Finally, in *NBC v. U.S.*, *supra*, this Court specifically noted that it reached the merits only because

> there is no basis for any claim that the Commission failed to observe procedural safeguards required by law.

319 U.S. at 225. As the instant case varies from all those discussed here, so also should the necessity to review the Commission's procedural failures and invalidate the *Policy Statement* on that ground.

## POINT II

**The Decision of the Court of Appeals Is Premised Upon and Compelled by the Regulatory Scheme Enacted by Congress in the Communications Act and the Consistent Interpretations of That Act by This Court and the FCC.**

As already discussed,[119] the *WNCN* decision is grounded in a statutory scheme which requires that a public interest determination be made by the Commission when passing upon all license applications, whether for an initial grant, transfer or renewal.[120] A hearing must be held whenever a substantial and material question is presented,[121] and the Commission may only grant those applications which it affirmatively finds would serve the public interest. The primacy of this statutory scheme has been consistently reiterated by this Court and by the D.C. Circuit.[122]

In *Ashbacker*, this Court held that the Commission may not deviate from the statutory requirement of a hearing, even if it believes an alternative procedure to be preferable.

> [W]e are not concerned here with the merits. This involves only a matter of procedure. Congress has granted applicants a right to a hearing on their applications for station licenses. *Whether that is wise policy or whether the procedure adopted by the Commission in this case is preferable is not for us to decide.* We only hold that where two *bona fide* applications are mutually exclusive the grant of one without a hearing to both deprives the loser of the opportunity which Congress chose to give him.

*Id.*, 326 U.S. at 333 (footnotes omitted) (emphasis added).

[119] See discussion at Point I [A] at pp. 29-31 *supra*.

[120] 47 U.S.C. § 309(a).

[121] 47 U.S.C. § 309(d)(2), (e).

[122] That court is "the sole forum for appeals from FCC licensing decisions." *WEFM*, *supra*, 506 F.2d at 266. *See* 47 U.S.C. § 402(b).



Of course, these constraints leave ample room for the Commission to adopt rules and policies of general application,[123] provided that they do not override the Commission's duty to weigh each license application under the public interest standard and to hold a hearing when the Act so requires. Thus, in upholding the Commission's decision not to require divestiture of most existing newspaper-broadcast ownership combinations, this Court emphasized that the Commission would continue to consider "issues relating to concentration of ownership . . . on a case-by-case basis in the context of license renewal proceedings" and that the rights of competing applicants and petitioners to deny would not be abridged. *NCCB*, *supra*, 436 U.S. at 788 n. 12, 791 n. 13, 809.

Similarly, the D.C. Circuit has held that the Commission's power to adopt general rules must be "linked to the existence of a safety valve procedure." *WAIT Radio v. FCC*, *supra*, 418 F.2d at 1157.

> That an agency may discharge its responsibilities by promulgating rules of general application which, in the overall perspective, establish the "public interest" for a broad range of situations, does not relieve it of an obligation to seek out the "public interest" in particular, individualized cases.

*Id.* And in *UCC I*, where the Commission had denied a hearing on "policy" grounds, the Court of Appeals reversed, noting that a policy determination which may be "valid in the abstract" would still call for "explanation in its application." *Id.* at 1008.

### A. The Commission's Format Policy Violates the Statutory Scheme

#### *1) The Format Cases*

Despite the express provisions of the Act and the clear mandate of *Ashbacker*, for ten years the

[123] *See* 47 U.S.C. §§ 303(r) & 154(i).

Commission has refused to abide by the statutorily prescribed procedures in dealing with listener-filed petitions to deny transfer applications involving the loss of unique formats, culminating in the *Policy Statement* here under review.

The history of the format cases has already been set forth.[124] Here we need only summarize the D.C. Circuit's position in order to better understand precisely how the Commission's essentially intransigent policy violates the statutory scheme.

In its format decisions, the D.C. Circuit held that "preservation of a format [that] would otherwise disappear, although economically and technologically viable and preferred by a significant number of listeners, is generally in the public interest."[125] A petition to deny a transfer which would entail the loss of a unique format thus raises issues material to the public interest which must be weighed by the Commission in making its required public interest finding.[126] And when such a petition presents substantial questions of fact as to the uniqueness of the endangered format, its economic viability, or the impact on the listening audience of its loss -- or if the Commission is otherwise unable to discern whether approving the transfer would serve the public interest -- a hearing must be held.[127]

The Court of Appeals was careful to note that its decisions did not create any special rules or policies for dealing with format changes.

> We treat format changes no differently from any other element affecting public interest.

[124] See discussion at pp. 12-17 *supra*.

[125] *WEFM*, *supra*, 506 F.2d at 268.

[126] *E.g.*, *Progressive Rock*, *supra*, 478 F.2d at 930.

[127] When we say that a format change is of public interest proportions we mean that it must be considered by the Commission in its ultimate determination of public interest . . . .

*E.g.*, *id.* at 929-30, 933-34; *WEFM*, *supra*, 506 F.2d at 260-62.



> If there are factual disputes, as there were in [*Atlanta*], then a hearing must be held. If there are none -- for instance the financial viability of the existing format and the alternative sources of that format may be undisputed, so that the Commission is faced only with balancing the competing interests with known and unchallenged factors, and thus determines where the public interest lies -- then no hearing is required.

*Progressive Rock*, *supra*, 478 F.2d at 930 (footnotes omitted).

These holdings are summarized in Part I A of the Court of Appeals' *WNCN* opinion, 610 F.2d at 842-843, FCC App. 4a-8a.

### 2) *The Commission's Position -- From Glenkaren[128] to the Policy Statement*

It is important to understand the precise nature of the decade-long disagreement between the Commission and the Court of Appeals. At the outset, it should be understood that the FCC has never attempted to refute the principles on which the analysis of the Court of Appeals is founded.

The Commission has not disputed, and does not now dispute, that the Act requires that it approve a transfer application only upon finding that the transfer would serve the public interest, and that a hearing is mandated whenever a substantial and material fact question bearing on the public interest is presented. Nor does the Commission deny that diversity of entertainment formats is in the public interest. Indeed, the *Policy Statement*, consistent with innumerable earlier and contemporaneous pronouncements

[128] *Glenkaren Associates, Inc.*, 14 RAD. REG. 2d (P&F) 104 (1968), *reconsideration denied*, 19 F.C.C. 2d 13 (1969), *rev'd sub nom. Citizens Committee to Preserve the Voice of the Arts in Atlanta (WGKA-AM & FM) v. FCC*, 436 F.2d 263 (D.C. Cir. 1970).

on the importance of diversity,[129] acknowledges that the listening public is "entitled" to such format diversity.[130]

Having thus accepted the very premises upon which the format cases were based, how is is that the Commission has intransigently refused to acquiesce in their teachings? The simple answer is that the FCC has essentially disregarded the issue which the Court of Appeals addressed in the format cases.

While the court focused on the necessity of considering the interests of the listeners of the existing format in determining whether to approve the transfer, the Commission's decisions presupposed that the transfer would take place and discussed only whether the transferee could be required to retain that format. It concluded in *Glenkaren* that so long as the proposed programming of the transferee could be said to serve the public interest,

> the matter is one for the judgment of the broadcaster and the Commission, in these instances, cannot properly insist that the prior format must be retained.[131]

In *Zenith Radio Corp., supra*, Commissioner Johnson's dissent clearly identified the Commission's failure to come to grips with the principles of *Atlanta*.

> After refusing to investigate in order to determine the requisite facts, the majority concludes that "There has been no showing here that the format . . . chosen by the assignee in the exercise of its discretion, is not reasonably attuned to the tastes and needs of the Chicago listening public." Given [*Atlanta*], that is truly a bizarre statement . . . .

---

[129] *See, e.g.*, notes 21 & 22 *supra*, and the discussion at pp. 6-10 *supra*.

[130] *Policy Statement*, 60 F.C.C.2d at 863, FCC App. 128a. *See also* FCC Br. 23, 34.

[131] *See Glenkaren Associates Inc., supra*, 14 RAD REG 2d (P&F) at 105-10.



> [W]hether or not the proposed . . . format is reasonably attuned to the tastes and needs of the Chicago public is not, under [*Atlanta*], the relevant inquiry . . . [T]he Court's primary point was that the mere fact that a format appeals to a majority in the community does not insulate the format change from further scrutiny. Rather, [*Atlanta*] demands that when a station's proposed format change will decrease the diversity of broadcast formats within a given community, the [FCC] must determine whether that resulting decline can possibly serve the public interest. As the [*Atlanta*] Court explained, we cannot make that determination simply by stating that a majority of the community would probably prefer the new format to the old.
>
> Yet, that is precisely what the majority does today.[132]

The unresponsiveness of the Commission's arguments to the holdings of the Court of Appeals thus reflects what the court refers to as the FCC's previously discussed "drastic misreading"[133] of the format cases. *WNCN, supra*, 610 F.2d at 850, FCC App. 23a.

Like those arguments, the Commission's contentions, both in its *Policy Statement* and in its brief to this Court, are addressed to nonexistent holdings very different from those which are actually contained in the format cases and in *WNCN*. "The truth is that the actual features of *WEFM* are scarcely visible in [the Commission's] highly-colored portrait." *WNCN, supra*, 610 F.2d at 851, FCC App. 24a. When the "straw man" posited by the Commission is set aside, and the actual holdings of the Court of Appeals are examined, the Commission's arguments fall away.

---

[132] *Zenith Radio Corp., supra*, 38 F.C.C.2d at 850 (dissenting opinion).

[133] *See* discussion at pp. 38-40 *supra*.

### *3) Commission Errors Based on Misconceptions of the Cases and the Statutory Scheme*

Understanding the true basis of the Commission's difference with the decisions of the Court of Appeals, especially *WEFM*, and with the statutory scheme they expound makes it possible to dispose of many of the subsidiary issues the Commission has raised here and elsewhere.

The Commission is not being asked to play the role of "national arbiter of taste"[134] nor to "determine the relative values of two different types of programming in the abstract."[135] The format decisions do not compel the Commission to force licensees to continue,[136] restore,[137] or abandon[138] particular formats, nor to "interfere with the broadcaster's selection of programming."[139] The Court of Appeals has made it painstakingly clear that it requires no such thing.[140]

The format cases do not require the Commission to engage in a system of pervasive governmental regulation[141] which entails "comprehensive . . . state

---

[134] *See Atlanta*, *supra*, 436 F.2d at 272 n. 7, reproduced at note 28 *supra*.

[135] *Policy Statement*, 60 F.C.C.2d at 864, FCC App. 130a. *See also* FCC Br. 50.

[136] *E.g.*, *Policy Statement*, 60 F.C.C.2d at 860, FCC Br. 18, 25-26, 45, 48.

[137] *E.g.*, *Policy Statement*, 60 F.C.C.2d at 859-860, FCC App. 120a-121a, FCC Br. 18.

[138] *E.g.*, *Policy Statement*, 60 F.C.C.2d at 859-860, FCC App. 120a-121a, FCC Br. 26, FCC Br. 52. *See also Policy Statement*, 60 F.C.C.2d at 860, FCC App. 123a.

[139] *WNCN*, *supra*, 610 F.2d at 851-52, FCC App. 25a-26a, reproduced at p. 25 *supra*.

[140] *Notice of Inquiry*, 57 F.C.C.2d at 582, FCC App. 65a.



surveillance,"[142] as the Court of Appeals has also made clear.[143] The Commission's distorted fears or misapprehensions are carried over into their arguments here, but with the same lack of basis in either the format decisions or the statutory scheme.

The issue before this Court is not whether the policies upon which the Commission relies -- licensee discretion in format choice and reliance on marketplace forces -- are correct as a general matter. The Court of Appeals has consistently accepted their general validity.

> As we have emphasized before and repeat today, *WEFM* was *not* intended as an alternative to format allocation by market forces. We fully recognized that market forces do generally provide diversification of formats. The licensee's discretion over programming matters is therefore very broad while the Commission's role is correspondingly narrow. However, we also recognized -- as does the Commission -- that the radio market is an imperfect reflection of listener preferences . . . .
>
> Further, as is clear from our earlier cases, the Commission's obligation to consider format issues arises only when there is strong prima facie evidence that the market has in fact broken down.

*WNCN*, *supra*, 610 F.2d at 851, FCC App. 24a (footnote omitted). Rather, the issue in this case is whether those general policies may be applied indiscriminately and without regard to their effect in particular cases on the public interest, thereby overriding the con-

---

[142] *Policy Statement*, 60 F.C.C.2d at 865, FCC App. 134a, citing *Lemon v. Kurtzman*, 401 U.S. 602, 619-20 (1971).

[143] *WNCN*, *supra*, 610 F.2d at 850-52, FCC App. 23a-26a. *See* discussion at pp. 24-38 *supra*.

gressional licensing scheme which is based upon particularized public interest decisions for each license grant,[144] renewal and transfer.[145] The answer to this question has been unmistakably provided by this Court in *Ashbacker* and followed uniformly by the Court of Appeals. The congressional licensing scheme, including the procedures set forth in the Act for its implementation, may not be disregarded or circumvented in favor of some other policy or procedure, however preferable the Commission may believe the latter to be.

There is simply no authority under sections 308-310 of the Act for the Commission to abdicate its role in the licensing process to marketplace forces. Such abdication would mean that the private interests of the broadcasters, and to an even greater degree the advertisers, will determine the degree of program diversity to be provided to the public. Both the Commission and the Court of Appeals have recognized that this advertiser-dominated market is an imperfect one which tends to neglect the interests of all but the most demographically desirable consumers.[146]

---

[144]The issue of unique formats is, without question, considered by the Commission in license grant proceedings. *George Cameron Jr. Communications, supra*; see discussion at p. 9 *supra*.

[145]Every licensee is subject to Commission scrutiny when it seeks renewal. *See* note 13 *supra*. Thus, although the licensee may be free under the Commission's general policy to select the entertainment format of his choice, where that choice – or any change therein – affects the public interest, it cannot escape such review by the Commission any more than other aspects of the licensee's programming can.

The situation is even clearer in the transfer context, where the proposed transferee is merely a prospective licensee. He is obviously free to make whatever programming – including format – proposals he wishes; but he has no right to be the licensee, and his proposals will be scrutinized by the Commission along with all other relevant matters in order that it can decide whether the proposed transfer would serve the public interest.

[146]*See* note 35 *supra*.



It may be that it is generally expedient to allow competitive forces to govern most programming choices, but the Commission should not, and statutorily may not lose sight of the proper relationship of competition to the regulatory scheme of licensing in the public interest.[147] When confronted with evidence that the market has failed in a particular instance the Commission may not, consistent with its duties under the Act, refuse to even consider the impact of that failure on the paramount rights of the public.

The Court of Appeals has not attempted to dictate to the Commission the manner in which it is to look, what it is to find, or how it is to weigh what it finds in the discharge of its duties. All it has done is admonish the Commission that it may not refuse to look at all; this the Act clearly demands. Any change in this arrangement must come from Congress,[148] not the Commission.

### B. The Court of Appeals Decision Is Consistent with and Supported by the Consistent Interpretations of the Communications Act by This Court and the Commission, and by the Act's Legislative History

The Court of Appeals' decisions in the format cases and in *WNCN* are thoroughly and carefully grounded not only in the Act itself, but also in the consistent interpretations of the Act in cases decided by this Court, and in the policies, rules and decisions

---

[147]As Justice Frankfurter found, competition may serve merely to provide "complementary or auxiliary support" to the basic regulatory scheme. *RCA, supra*, 346 U.S. at 93.

[148]Congress has been considering "deregulatory" legislation for several years, and has before it several bills which would alter the present statutory mandate for consideration of format changes in making public interest determinations in connection with licensing applications. S. 611, 96th Cong., 1st Sess. § 301 (1979); S. 2827, 96th Cong., 2d Sess. § 307 (1980).

of the FCC dating back to the earliest days of radio regulation. Moreover, the Act's legislative history in no way bars the Commission from complying fully with the holdings of the Court of Appeals.

### *1) Decisions of This Court*

This Court's decisions have uniformly interpreted the Act in the manner previously discussed,[149] and fully support the Court of Appeals holding that, under the comprehensive regulatory scheme enacted by Congress, each licensing decision must be based upon an affirmative finding that the grant would serve the public interest.[150]

Petitioners contend, however, that this Court's decision in *Sanders Bros.* recognizes a statutory policy of "free competition" which precludes the Commission from taking format changes into account in its public interest deliberations.[151] In addition, they urge that the Court of Appeals decisions, by violating this alleged *Sanders Bros.* policy, would impose common-carrier obligations on broadcasters in derogation of this Court's holdings in *Sanders Bros.*, *CBS v. DNC*, and *Midwest Video II*.[152] These contentions are without merit.

Despite the Commission's long-standing[153] reliance on *Sanders Bros.*, the logic of that case in fact strongly

---

[149] *See also* the discussion in Point I [A] at pp. 29-31 *supra*.

[150] *E.g.*, *NBC v. U.S.*, 319 U.S. at 225; *Ashbacker*, *supra*, 326 U.S. at 329-33.

[151] FCC Br. 8, 23-24; ABC Br. 41-42; Insilco Br. 21-22.

[152] FCC Br. 24-26; ABC Br. 42-43.

[153] The FCC has made the identical argument in *Atlanta* (Brief for Appellee at 19) and *WEFM* (*Burch Statement*, 40 F.C.C.2d at 230), and in the *Notice of Inquiry* (57 F.C.C.2d at580-81, FCC App. 61a-62a), the *Policy Statement* (60 F.C.C.2d at 860-61, FCC App. 122a-123a), and the Denial of Reconsideration (66 F.C.C.2d at 79-80, FCC App. 178a-180a).



supports the decision below. In *Sanders Bros.* this Court held[154] that "resulting economic injury to a rival station" is not a factor to be weighed by the FCC in passing on a license application except insofar as the public interest is affected by it.[155] Thus the Commission could not deny the listeners of a community the benefits of an additional broadcast service merely because an existing licensee would suffer economic loss from the resulting increase in competition.

> Plainly it is not the purpose of the Act to protect a licensee against competition but to protect the public.[156]

But where it is shown that additional competition *would* have an adverse impact on the public, the Commission "does not disregard" the question of competition.[157]

Thus, the import of *Sanders Bros.* is that the FCC's duty is to assure, through its licensing decisions, that the public is well served -- as by having the increased service and diversity which an additional local outlet would bring -- even if doing so will visit economic

---

[154] The Commission's characterization of the language it quotes as being the "holding" of *Sanders Bros.* is inaccurate. *See Policy Statement*, 60 F.C.C.2d at 860, FCC App. 123a.

[155] 309 U.S. at 473.

[156] *Id.* at 475. This language has been consistently and pointedly omitted from the Commission's frequent citation of and quotation from *Sanders Bros.*, *see* note 51, *supra*, including its brief herein, FCC Br. 8, 23-24. Petitioners ABC *et al.* also omit this language, ABC Br. 41-42. Petitioners Insilco *et al.* include it, but do not address its import in the present case, Insilco Br. 21-22.

[157] 309 U.S. at 475-76. Thus *Carroll Broadcasting Co. v. FCC*, 258 F.2d 440 (D.C. Cir. 1958) held that the Commission must afford an existing licensee the opportunity to present proof that the economic effect of granting a license for an additional station in its geographical location would be detrimental to the public interest. This has come to be referred to as a "Carroll issue," and is an established part of Commission practice.

injury on broadcasters. But the Commission would have this Court read *Sanders Bros.* as if it had held that the Commission must assure broadcasters the economic benefits of freedom from regulation even if to do so would cause the public to be ill-served. This is precisely contrary to this Court's actual holding, which is fully consistent with and supportive of *WNCN*.

As the Court of Appeals noted in *WEFM*,[158] subsequent decisions of this Court make clear that *Sanders Bros.* cannot be taken to authorize the Commission to abdicate entirely to the marketplace its duty to regulate in the public interest.[159] And in discharging that duty the Commission may, as this Court has expressly noted, take into account licensees' program formats.

> [In 1943] the Court considered the validity of the Commission's chain broadcasting regulations, which among other things forbade stations from devoting too much time to network programs in order that there be suitable opportunity for local programs serving local needs. The Court upheld the regulations, unequivocally recognizing that the Commission was more than a traffic policeman concerned with the technical aspects of broadcasting and that it neither exceeded its powers under the statute nor transgressed the First Amendment in interesting itself in *general program format* and the kinds of program broadcast by licensees. *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943).

*Red Lion*, *supra*, 395 U.S. at 395 (emphasis added). As the Court there also observed, "[i]n applying [the public interest] standard the Commission for 40 years

[158] 506 F.2d at 267.

[159] *NBC v. U.S.*, *supra*, 319 U.S. at 216-17; *RCA*, *supra*, 346 U.S. at 93.



has been choosing licensees based in part on their program proposals." *Id.* at 394.

The Commission's argument[160] that *WEFM* and *WNCN* would impose common carrier obligations on broadcasters and thereby violate § 3(h) of the Act[161] and this Court's holdings in *CBS v. DNC* and *Midwest Video II* is difficult to understand. As this Court made clear in *Midwest Video II*,[162] the hallmark of common-carrier status is the carrier's obligation to provide non-discriminatory public access to its facilities. The Court of Appeals took pains in *WNCN* to emphasize that:

> Nothing remotely resembling public access obligations is involved in the present case. Nor do we find persuasive the other asserted resemblances between *WEFM* and common carrier regulation: it neither obligates broadcasters to "continue in service," regulates the rates charged to advertisers, or prohibits unnecessary duplication of facilities.

610 F.2d at 851-52 n. 36, FCC App. 26a. Under no circumstance would any non-licensee be afforded access to a broadcasting station by virtue of anything held, or even intimated, in the format cases or *WNCN*.

The Commission argues that to compel a broadcaster to "perpetuate a particular entertainment format as a condition to renewing or transferring its license would impose similar restraints [to common carriers' obligations to continue service] on radio broadcasters."[163] This misconstrues the format cases and *WNCN*, none of which even suggest that such a "condition" would, or could, be imposed.

[160] FCC Br. 24-26. Petitioners ABC *et al.* make the same argument. ABC Br. 42-43.

[161] 47 U.S.C. § 153(h).

[162] *Midwest Video II*, *supra*, 440 U.S. at 700-05.

[163] FCC Br. 25.

As the Court of Appeals stressed in *WNCN*, the Commission "cannot . . . force retention of an existing format."[164] Although a broadcaster might choose to refrain from making a format change which, because it would be contrary to the public interest, might create a risk of nonrenewal of his license,[165] this does not subject him to common carrier obligations any more than do his other duties as a public trustee.[166]

Finally, the Commission suggests that the necessity of inquiring into a licensee's financial affairs and of making "conjectures about its profitability under hypothetical conditions . . . would convert the licensee into a common carrier . . . ."[167] The decisive refutation of this argument is *Sanders Bros.* itself.

That case, which the Commission can hardly contend failed to appreciate the distinction between broadcasters and common carriers, would require precisely the sort of inquiry and "conjectures" that the Commission refers to whenever a licensee claimed that competition from a proposed new station would adversely affect service to the public. This is what the Court of Appeals held in *Carroll Broadcasting Co. v. FCC*, 258 F.2d 440 (D.C. Cir. 1958), where the argument now advanced by the Commission was rejected:

> The Commission says that, if it has authority to consider economic injury as a factor in the public interest, the whole basic concept of a competitive broadcast industry disappears. We think it does not. Certainly the Supreme Court did not think so in the Sanders Brothers case, supra.

*Id.* at 443.

[164] *WNCN*, *supra*, 610 F.2d at 851, FCC App. 25a-26a.

[165] *See* FCC Br. 25 n. 12.

[166] The same risk would presumably induce him to abide by the fairness doctrine, *see Red Lion*, *supra*, and to broadcast news and informational programming. This is precisely what regulation of broadcasting in the public interest is supposed to accomplish.

[167] FCC Br. 45.



### *2) Agency Policy and Decisions*

As previously discussed, since the enactment of the Radio Act of 1927, agency decisions and policy have regarded programming generally, and programming format in particular, as relevant and material to the public interest.[168] Accordingly, the Commission always has, and continues to weigh program format considerations in many of its licensing decisions.

At the very outset of federal radio regulation, the Federal Radio Commission recognized the importance of programming to the public interest.[169] When the FCC succeeded to the Radio Commission's duties following enactment of the present Act, it soon expressed similar views. Thus in its REPORT ON CHAIN BROADCASTING, issued in 1941 following an investigation of the radio networks, the FCC adopted numerous regulations governing network practices as they affected programming. Such regulations were viewed as necessary, and justified under the Act, so that licensees might give the public the best possible service.[170]

Five years later, in 1946, the Commission, in its famous BLUE BOOK[171] expressed in clear terms the close relationship between programming and the public interest. The BLUE BOOK went beyond the Commission's earlier concerns with duplication of programming and local control as opposed to network domination; it discussed in direct terms the obligation of broadcast licensees to serve the public's interest in receiving a diversity of program types, and stated that program format choices were central to the fulfillment of those obligations.

[168] *See* discussion at pp. 9-10 *supra*.

[169] *See* Federal Radio Commission, *Second Annual Report* (1928) quoted at note 53 *supra*.

[170] *See, e.g.*, REPORT ON CHAIN BROADCASTING 52, 57 (1941), as cited in *NBC v. U.S.*, *supra*, 319 U.S. at 199, which upheld the chain broadcasting regulations adopted there.

[171] *See also* note 15 *supra*.

> It has long been an established policy of broadcasters themselves and of the Commission that the American system of broadcasting must serve significant minorities among our population, and the less dominant needs and tastes which most listeners have from time to time.

*Id.* at 15.

In 1960, the Commission returned once again to the subject of licensees' programming obligations. In its *Program Policy Statement (En Banc Programming Inquiry)* 44 F.C.C. 2303 (1960), the Commission emphasized the necessity of each broadcaster's programming serving the "tastes and needs" of his local community. *Id.* at 2312.

It is not only the Commission's policy expressions concerning programming generally which have emphasized its close relation to the public interest and the significance of choices of entertainment formats.[172] The Commission's policy toward comparative license proceedings has attached an even greater importance to applicants' and licensees' format choices.

Thus, as expressed in the Commission's 1965 *Policy Statement on Comparative Broadcast Hearings, supra*,[173] a proposal of a licensee or applicant to operate a format which would provide a "specialized" or unique service in its community was to receive "merit" towards "preference" as against its competitors in the licensing hearing held pursuant to *Ashbacker*. This rule has been modified since, but a successor version which still provides favorable treatment for unique formats remains in effect to this day. *See George E. Cameron Jr. Communications, supra.*[174] The rule giving special

[172] *See also, e.g.*, the 1971 *Primer on Ascertainment of Community Problems by Broadcast Applicants*, quoted at note 29 *supra*.

[173] 1 F.C.C. 2d 393, 397-98 (1965).

[174] 71 F.C.C. 2d 460 (1979).



merit to proposals for unique service since was approved and followed as recently as July 1980 in *Commercial Radio Institute, Inc.*, 47 RAD.REG. 2d (P&F) 1307 (Rev. Bd. 1980).

In addition to taking unique formats into account in comparative proceedings, the Commission also looks to those considerations in many proceedings involving frequency allocations.[175] The theme is the same in all of them: licensees who offer, or applicants who propose unique formats receive preferential treatment from the Commission, whether in the form of waivers of various Commission rules, or through receiving broader protection than would otherwise be afforded them.

It is impossible to square this pattern of active encouragement of program diversity with the Commission's professed inability -- both legal and practical -- to delve into such matters. The situation is simply one of discrimination against the listening public since it is only they, despite their standing under *UCC I* as parties in interest in Commission proceedings, who are unable to get the Commission to "look" at broadcasters' format choices.[176]

### *3) Legislative History*

The briefs of the petitioners argue, in various ways, that notwithstanding all the above authority which clearly supports *WNCN*, the legislative history of the Act somehow invalidates that decision and the other format cases.

The most extreme position is taken by Insilco, which views the legislative history as demonstrating

[175] *See, e.g.*, cases cited in note 22 *supra*.

[176] *See* discussion at pp. 10-12 *supra*.

> that Congress did not intend the Commission to engage in format regulation.[177]

The Commission and CBS are somewhat more modest in their contentions that that history[178] shows Congress's intent to prohibit the Commission from

> choos[ing] among various types of programming selected by licensees, and establish[ing] priorities as to subject matter.[179]

The problem with the petitioners' legislative history arguments is that they are essentially irrelevant to the narrow issue presented in this case. Read carefully, all that the legislative history cited by all petitioners shows is that Congress did not intend an *allocations* scheme[180] based on program categories.

[177] Insilco Br. 20-21. The use of the entirely overblown and inappropriate term "format regulation," like the other distortions discussed above, demonstrates the total irrelevance of Insilco's analysis of the issues actually presented in this case. No one – not the Court of Appeals, or any of the respondents here – believes that the Commission should engage in "format regulation." The public interest determination, in individual licensing proceedings, which is required by the statute is a far cry from Insilco's characterization.

[178] The reviews of legislative history are contained in FCC Br. 27-30, ABC Br. 43-50, Insilco Br. 20-21 and will not be repeated here.

[179] ABC Br. at 51. The Commission *discusses* the issue in these terms, but its point sub-heading, like Insilco's, speaks of format regulation. FCC Br. at 27.

[180] At the time of passage of the Act, and in the years preceding, there were various legislative attempts to allocate broadcast facilities to various special uses – educational, religious, agricultural, labor, cooperative – first, under the so-called Hess bill, and later under the Wagner-Hatfield bill. None of these attempts at allocation was successful. Instead, the FCC was directed by Congress to hold hearings on the reserved channel concept and report back to Congress. The notion of reserved channels was clearly not renounced by Congress. All of the petitioners' briefs in this Court contain parts of the debate, but a full description of this history may be found in E. Barnouw, THE GOLDEN WEB, A HISTORY OF BROADCASTING IN THE UNITED STATES, VOLUME II-1933 TO 1953, at 22-28 (1968). *See also id.* at 293-95 for discussion of the Commission's action in reserving educational television channels without seeking additional legislative authority.



The format decisions, premised on individual public interest determinations in individual renewal or transfer situations, have nothing to do with allocations, as the D.C. Circuit has repeatedly told the Commission.[181]

To the extent that the Commission has historically read the legislative history of the Act not as to allocations, but as it relates to the Commission's authority to "consider program service of a licensee in passing on its application,"[182] the Commission has never seen that history as barring what the format cases require.[183]

The legislative history[184] thus poses no bar to the decision below which must, for all the reasons previously discussed, be affirmed.

## POINT III

### The Decision of the Court of Appeals Is Entirely Consistent with This Court's Explication of the First Amendment in the Broadcasting Context.

The very same decisions of this Court which define the Commission's duty under the Act to select and regulate licensees in the public interest, establish clearly that the First Amendment does not prohibit

[181] *See* discussion at pp. 24-25 *supra*.

[182] BLUE BOOK, *supra*, at 11-12.

[183] Clearly, as already discussed, the Commission could not have enacted the chain broadcasting rules nor could it have defended them in this Court if it had accepted the restrictive, but ultimately irrelevant view of the legislative history proposed by petitioners in this case.

[184] One of the broadcast petitioners, ABC, argues that the legislative history of § 310(d) also "forecloses Commission regulation of format changes in the assignment/transfer context." ABC Br. 49-50 n. 126. Aside from the fact that it is not regulation, but consideration of format changes which *WNCN* requires, it is significant to note that the Commission does not here, nor has it previously relied on this argument. In fact, its position has been to the contrary, *see Wichita-Hutchinson Co.*, 20 F.C.C.2d 584, 586 (1969). *See WNCN, supra*, 610 F.2d at 852 n. 37, FCC App. 26a-27a n. 37.

the Commission from basing its public interest determinations in part upon the program proposals of applicants and the past programming of licensees. The holdings of these cases are summarized in this Court's opinion in *Red Lion*, which is completely dispositive here.[185]

We believe that *Red Lion*'s comprehensive, authoritative and definitive explication of the First Amendment's relation to the Act, and to the electronic media, encompasses and rebuts all the issues raised by petitioners. However, in an excess of caution, petitioners' various arguments will be addressed here within the constitutional framework provided by *Red Lion*.

### The Constitutional Framework

*Red Lion* properly sets broadcasting apart from other media and firmly establishes that, as opposed to other channels of mass communication, the public's free speech interest in having access to diverse broadcast programming takes precedence over broadcasters' claims to unfettered programming discretion. *Id.*, 395 U.S. at 390. Under the First Amendment and the Act's public interest standard, broadcasters are obligated to serve the paramount public interest.[186] *Id.* at 390, 392. While *NBC v. U.S.* and *Pottsville* presaged this result, it was *Red Lion* that firmly established that broadcasters' speech rights are subordinate to the public interest in diversity.

This seemingly novel allocation of First Amendment rights is not inimical to traditional free speech concepts. Rather, the framework established in *Red Lion* promotes historical First Amendment values in a manner consistent with the unique physical characteristics of the electronic media.

[185] *Red Lion*, *supra*, 395 U.S. at 394-95.

[186] "Correspondingly, it is the Commission's obligation to actively ensure that broadcasters meet that responsibility. *Id.* at 380, 395.



This Court's starting point in *Red Lion* was the simple, technological fact that free entry into the broadcasting marketplace is non-existent. Mr. Justice White reasoned that "it is idle to posit an unabridgeable First Amendment right to broadcast . . . [A]s far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused." *Id.*, 395 U.S. at 388-89. *See also CBS v. DNC*, *supra*, 412 U.S. at 101; *NBC v. U.S.*, *supra*, 319 U.S. at 226.

This Court, consistent with the First Amendment's traditional concern for diversity, established that

> [i]t is the [First Amendment] right of the viewers and listeners, not the right of the broadcasters, which is paramount . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.

*Red Lion*, *supra*, 395 U.S. at 390.[187] It is, this Court reasoned, "the people as a whole [who] retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. . ." *Id.* Licensees must thus program in a manner that meets the public's "paramount" First Amendment rights. The Commission

> neither exceed[s] its power under the [Communications Act] nor transgress[es] the First Amendment in interesting itself in general program format and the kinds of programs broadcast by licensees.

[187] "This all-inclusive panoply of concepts lays to rest any claim by the petitioners that entertainment programming is to be treated any differently than public affairs programming. We note that foreign language formats fall within several of the protected "ideas and experiences" thus most dramatically demonstrating the First Amendment interface between information and entertainment which *Red Lion* recognizes. *See* discussion at pp. 89-92 *infra*.

*Id.* at 395. This power is the heart of the Commission's licensing function. *Id.*

There is little doubt that such a constitutional framework is unique to broadcasting. However, that does not render the system suspect. The singular qualities of broadcasting, in conjunction with the primacy of the First Amendment's goal of diversity, compel the constitutional analysis adopted by this Court in *Red Lion* and sustain the result reached in the court below.

## A. The Petitioners' Attempt to Impose a Least Drastic Means Test Would Require Overruling *Red Lion* and So May Not Prevail

Petitioners incorrectly argue that because the Court of Appeals merely stated that it found "no constitutional impediment" to its format decisions,[188] it failed to seriously examine the alleged "chilling effect" of the doctrine and their contention that programming diversity can be better achieved through the "less intrusive means" of reliance upon free competition in the marketplace and structural forms of regulation.[189]

[188] *WNCN, supra*, 610 F.2d at 855, FCC App. 33a.

[189] It is conceded, however, that these First Amendment claims were fully briefed and argued below. ABC Br. 18 n. 45. The Court of Appeals, while perhaps terse, merely analyzed the petitioners' arguments from the perspective established in *Red Lion* and found those claims to be totally without merit. Petitioners are not entitled to a lengthy judicial explication on a point long disposed of.



In fact, however, since the basic constitutional framework of *Red Lion* clearly excludes such reliance, it is apparent that petitioners[190] are actually asking nothing less than that *Red Lion* be overruled. This is unwise, ill-timed,[191] and, we believe, unconstitutional.

### *1) The Traditional "Less Drastic Means" Test for Constitutionality Is Inappropriate to the Physical Realities of Broadcasting and First Amendment Values Sought to Be Preserved and Furthered*

Although petitioners would substitute the rationale of *Miami Herald* for that of *Red Lion*, none offers any explanations as to why the factual basis for *Red Lion*'s holding -- the physical[192] and legal inhibitions to free entry into the broadcast industry -- have fallen

[190] Insilco candidly challenges *Red Lion*'s rationale in light of this Court's subsequent, but entirely inapplicable decision in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) [*Miami Herald*]. Insilco Br. 35-37. ABC simply advocates the adoption of the traditional, non-broadcasting "less drastic means" analysis, ignoring the fact that it is totally at odds with the physical realities of broadcasting recognized in *Red Lion*. *See* ABC Br. 56-59. The Commission, perhaps constrained by its obligation to promote the First Amendment, raises this argument with somewhat less vigor. FCC Br. 57.

[191] The continued validity of *Red Lion* and the special First Amendment consideration it involves were recently reaffirmed in this Court's decision in *Consolidated Edison Co. of New York, Inc. v. Public Service Comm. of New York*, ____ U.S. ____, 100 S.Ct. 2326 (1980).

[192] The physical properties of the electromagnetic spectrum have not mellowed with time, and it is still true that not everyone who may wish to broadcast is free to do so. Nor do the Commission's proposals to slightly expand the number of usable radio outlets, *see* FCC Br. 57 n. 42, alter those physical characteristics, nor seriously decrease spectrum scarcity. This fact is most graphically shown by the petitioners' favorite example, the marketplace. Within the last year, an AM station in New York, WHN, sold for $14 million. So much for the end of scarcity.

into disrepute.[193] Rather, they merely argue that from a broadcaster's perspective, the public interest would be better served by allowing them free rein in a marketplace that does not allow for free entry.[194] This is precisely the theory rejected by this Court in *NBC v. U.S.*,[195] a rejection expanded upon in *Red Lion*, and reaffirmed in cases decided subsequent to *Miami Herald*.[196]

---

[193] The only support that Insilco appears able to muster for its argument is certain passages from B. Schmidt, FREEDOM OF THE PRESS VS. PUBLIC AACCESS 244 (1976). A careful reading of Schmidt's book reveals, however, that Insilco's citations actually cut against its claim. While Schmidt does note that the full "future" development of alternative electronic media -- *e.g.*, cable television -- may someday partially overcome the arguable First Amendment shortcomings inherent in broadcasting's physical characteristics, as he acknowledges, these are mere hopes and expectancies. *See e.g.*, B. Schmidt, *supra*, at 199-202. Moreover, one of Schmidt's brightest hopes for overcoming the physical and legal limitations on broadcasting recognized in *Red Lion* was cable access, which this Court subsequently struck down in *Midwest Video II*. B. Schmidt, *supra* at 205-216. Insilco's post-*Midwest Video II* reliance on Schmidt's hopes for the continued development of alternative schemes for diversifying the electronic media is misplaced.

[194] Although the financial cost of entry into the print media may be high, unlike broadcasting there are no physical or legal obstacles preventing entry into the market. This is the constitutional basis for the distinction which permits limitations on broadcasters' absolute programming discretion in order to serve the "paramount" First Amendment rights of listeners.

[195] In *NBC v. U.S.* this Court, using Justice Frankfurter's oft-quoted analogy, rejected the notion of the Commission's only role as a "traffic officer." *See* note 52 *supra*.

[196] *See e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 49, n. 55 (1976); *Bigelow v. Virginia*, 421 U.S. 809, 825, n. 10 (1975). Likewise, in *CBS v. DNC*, *supra*, 412 U.S. at 129, the Court dismissed cases such as *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972),(upon which the petitioners here also rely) as "provid[ing] little guidance . . . in resolving the question . . ." of the allocation of First Amendment rights in broadcasting.



If the "less drastic means" test had the applicability to broadcasting proposed by the petitioners, this Court in *NBC v. U.S.* would had to have reached the constitutionally mandated conclusion that any FCC intrusion beyond the "traffic officer" stage was impermissible, despite clear Congressional intent to the contrary. If the Commission were constitutionally restricted to policing the airwaves solely for interference, broadcasters would be left to the unfettered exercise of their free speech rights, while listeners' free speech rights would be left to the protection of "free competition" in the marketplace.[197] This is clearly a "less drastic means" of regulating broadcasting. It is exactly what the petitioners here advocate as being of constitutional necessity. It is also exactly what this Court rejected in *NBC v. U.S.*

> This Court wrote:
>
> [t]he "public interest" to be served under the Communications Act is . . . the interest of the listening public in "the larger and more effective use of radio." [47 U.S.C.] § 303(g). The facilities of radio are limited and therefore precious; they cannot be left to wasteful use without detriment to public interest . . . .

*Id.*, 319 U.S. at 216. Had the Congress been constitutionally bound to adopt the least intrusive regulatory scheme that avoided chaos on the airwaves, *id.* at 210-213, this Court could not have reached the conclusion that the Communications Act "was a proper exercise of [Congress'] power over commerce . . . ." *Id.* at 227. *See also id.* at 217, 219; *Pottsville*, *supra*, 309 U.S. at 137.

---

[197] As previously discussed marketplace competition does not always protect the First Amendment rights of minorities, those with minority tastes, and those who are, for reasons of demographics, less favored by advertisers, *see, e.g.*, p. 21 and note 35 *supra*, a fact which the Commission concedes, *see Policy Statement*, 60 F.C.C 2d at 863, FCC App. 128a.

*NBC v. U.S.* emphasized the constitutional necessity of Congress having placed "upon the Commission the burden [through its licensing function] of determining the composition of [the] traffic [on the airwaves]." *Id.* at 216. The same rationale was utilized 26 years later in *Red Lion*. *See NBC v. U.S., supra*, 319 U.S. at 226-227. This Court rejected the argument that only the least intrusive means of regulation are permissible in broadcasting. As Judge Learned Hand commented, speaking for the lower court in *NBC v. U.S.*:

> The Commission does therefore coerce . . . [the licensees'] choice and their freedom; and perhaps, if the public interest in whose name this was done were other than the interest in free speech itself, we should have a problem under the First Amendment; we might have to say whether the interest protected, however vital, could stand against the constitutional right. But that is not the case. The interests which the regulations seek to protect are the very interests which the First Amendment itself protects . . ."

*National Broadcasting Co. v. United States*, 47 F.Supp. 940, 946 (S.D.N.Y. 1942), *aff'd*, 319 U.S. 190 (1943).

### 2) *The "Less Drastic Means" of Insuring Diversity Proposed by Petitioners Are Neither Less Drastic Nor Responsive to the First Amendment Interests Here Under Consideration*

Ironically, a number of the "less drastic means" of promoting diversity raised by the petitioners are in fact far more intrusive upon broadcasters' programming choices than even their most nightmarish versions of the format cases. Examples include the



Commission's AM-FM non-duplication rule,[198] which actually *prohibits* certain programming -- that duplicated on jointly-owned AM and FM stations in the same market, the chain broadcasting rules,[199] and the Prime Time Access Rule.[200]

Petitioners also note several structural regulations generally going to diversity of ownership which they argue are sufficient for insuring diversity.[201] These, however, are irrelevant to the concepts here under consideration. The format cases address questions of program diversity *regardless* of the identity of the licensee, just as was the case in *Red Lion*.

The two approaches to the general goal of media diversity are complementary, not fungible; they focus on entirely different aspects of the problem. In *NCCB* this Court agreed that diversity of ownership was not paramount, service was. *Id.*, 436 U.S. at 803-815. Thus those structural forms of regulation cited by the petitioners are not only not "less intrusive" than the format doctrine, they are not even related to the diversity goal here in issue.

Similarly, petitioners propose[202] prospective remedies like equal employment opportunity and

---

[198] *See e.g.*, ABC Br. 57-58. This is patently restrictive of broadcasters' programming discretion, yet the petitioners inexplicably tout the non-duplication rule as being less insidious than the format cases.

[199] Those rules, upheld in *NBC v. U.S.*, restricted both broadcasters' and networks' freedom to, respectively, select and offer programming.

[200] That rule, also restricting licensees' ability to select program for showing at particular times, was upheld in *Mt. Mansfield Television, Inc. v. FCC*, 422 F.2d 470 (2d Cir. 1971). *See also United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968), where the Court upheld the Commission's restrictions upon cable television operators' freedom to retransmit television signals, and *Midwest Video I*, upholding a requirement that cablecasters originate some programming.

[201] *See* FCC Br. 57 n. 42, ABC Br. 57-58, Insilco Br. 34-35.

[202] *See, e.g.*, FCC Br. 57 n. 42.

minority ownership.[203] These are complementary to, but far from fungible with the more limited, but separate impact of the format cases. Further, they are designed to bring about greater diversity in the future, not to prevent an actual loss of diversity in the present. This is the First Amendment interest safeguarded by *WNCN* and other format cases, to which the petitioners' suggestions are entirely unresponsive.

## B. The Format Decisions Preserve and Protect All Listeners' Paramount Right to Diversity

In *UCC I* Chief Justice Burger observed that the alternative to Commission response to public participation and complaint in massive, day-to-day scrutiny of licensee performance by the Commission.[204] Another alternative, of course, is a complete abandonment of any public interest consideration to the unfettered forces of marketplace competition.

The former poses an enormous threat to First Amendment freedoms of broadcasters and listeners alike.[205] The latter would, as previously discussed, violate the clear statutory scheme and would also be constitutionally impermissible. *See CBS v. DNC*, *supra*, 412 U.S. at 123. As this Court stated in *Red Lion*, 390 U.S. at 392:

> There is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all. "Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests." *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

The *WNCN* decision and other format cases avoid both these problems and protect the general public's "paramount" First Amendment interest in diverse programming in a way entirely consistent with *UCC I*.

The abandonment of a unique,[206] financially viable format results in a *per se* diminution of program diversity.[207] The mechanism that triggers Commission inquiry is the "significant public grumbling" coming from the disenfranchised group of listeners, and although those who are grumbling may perceive that they have a very personal interest in the question, it is the public interest in diversity that they are actually vindicating.

Thus, contrary to the petitioners' claims,[208] the format cases do not favor one particular group

[203] *Non Discrimination in Employment Practices*, 60 F.C.C.2d 226 (1976), and *Minority Ownership of Broadcast Facilities*, 68 F.C.C.2d 979 (1978), are designed to bring more racial and ethnic minorities into active participation in broadcasting, with the hope that this will make broadcasting more sensitive to the needs and tastes of minority groups.

[204] See discussion at p. 11 *supra*.

[205] It is not, however, as already discussed, in any way a potential result of the format decisions. See pp. 24-25 *supra*.

[206] It is, of course, only the abandonment of a *unique* format which implicates this *general* interest in diversity. If one of several, generally similar formats is to be deleted, although a significant group of listeners may indeed grumble over the prospect of losing their favorite disc-jockey or program-mix, that is not a protected public interest, because diversity is not threatened. Unless there is a realistic threat to diversity, Commission action is not mandated. *See e.g., James C. Sliger*, 70 F.C.C.2d 1565, 1597-99 (1977); Federal Radio Commission, *Second Annual Report* 166-68 (1928).

Whether that loss is *offset*, in terms of the public interest, by other factors such as the adoption of another unique format, is, of course, a proper area for Commission inquiry. *Red Lion*, *supra*, 395 U.S. at 395; *NBC v. U.S.*, *supra*, 319 U.S. at 215-16, 219, an inquiry which is clearly left open by the decision below.

[207] See FCC Br. 54.

of listeners' programming preferences over another's.[209] Nor do they subjugate any broadcaster's First Amendment rights to the whims of any segment of the audience.[210] The cases merely safeguard – where the marketplace threatens to fail – the First Amendment's preference for diversity over a broadcaster's preference for greater profits.

### C. The Format Decisions Do Not Constitutionally Chill Licensee Programming Discretion

In balancing the public's First Amendment right of diversity of programming and the licensee's discretion to select program formats "it must constantly be kept in mind that the interest of the public is the foremost concern . . . ." *CBS v. DNC, supra*, 412 U.S. at 122. Thus, "a licensee must balance what it might prefer to do as a private entrepreneur with what it is required to do as a 'public trustee'." *Id.* at 118.

The petitioners argue that the mere possibility of a hearing as a result of a format change challenge will result in licensee self-censorship and deter innovative programming.[211] As previously discussed,

[209] In the same way, the format cases do not allow one segment of the listening audience, whose collective desire for a non-unique format may be highly intense, to prevail over the possibly less intense preference of those who favor the retention of a unique format. The system only safeguards, to the greatest extent reasonably possible against a general reduction in diversity. *WEFM, supra*, 506 F.2d at 267.

[210] In this regard, the petitioners' claims that the doctrine advances precisely the sort of governmental arbitration of taste proscribed in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), is clearly illusory. Under the format cases, the Commission's sole obligation is to actively insure that diversity of programming is maintained where economically and technically feasible. *WEFM, supra*, 506 F.2d at 267.

[211] *See, e.g.*, FCC Br. 46-49, 55; ABC Br. 62-64.



the record contains not one iota of actual evidence supporting this contention and the court below was entirely correct in rejecting it. FCC Br. 46-49; ABC Br. 62-64.

The Commission's administrative experience similarly does not support petitioners' claim.[212] The format cases presented to the Commission have been neither numerous nor burdensome.

A review of the format cases which have reached the Commission, commencing with *WCAB, Inc.*, 27 F.C.C.2d 743 (1971), indicates that most of these cases have been either settled or expeditiously disposed of on the basis of the initial pleadings.[213] Often, complaints about alleged format changes have been dispensed with through letter rulings with neither the necessity of a hearing nor even the rendering of an opinion on the merits.[214] The Court of Appeals correctly characterized the fears expressed here by petitioners, as somewhat less than realistic. *WNCN, supra*, 610 F.2d at 848, FCC App. 19a.

Since in ten years only one case involving an allegedly unique format has actually gone to hearing,

[212] *See* discussion at p. 25 and note 60 *supra*.

[213] *See, e.g., Riverside Broadcasting Co., Inc.*, 64 F.C.C.2d 866 (1977); *Stockholders of Rust*, 64 F.C.C.2d 883 (1977); *Thunderbird Broadcasting Co.*, 61 F.C.C.2d. 1190 (1976); *Republic Broadcasting Corp.*, 57 F.C.C.2d 336 (1975); *Post-Newsweek Stations*, 57 F.C.C.2d 326 (1975); *Dick Broadcasting Co., Inc. of Tenn.*, 47 F.C.C.2d 1051 (1974); *Walter E. Webster, Jr.*, 43 F.C.C.2d 300 (1973); *Midwestern Broadcasting Co.*, 42 F.C.C.2d 1091 (1973); *Tri Cities Broadcasting Co.*, 42 F.C.C.2d 499 (1973); *Biola Schools & Colleges, Inc.*, 29 F.C.C.2d 787 (1971).

[214] *See, e.g., National Broadcasting Co., Inc.*, 39 F.C.C.2d 400 (1973); *Koeth Broadcasting Co. Inc.*, 40 F.C.C.2d 534 (1973); *Rebel Broadcasting Co. and Tri-Cities Broadcasting Co.*, 40 F.C.C.2d 619 (1973); *William K. Alexander*, 41 F.C.C.2d 948 (1973); *Mid-South Broadcasting Corp.*, 44 F.C.C.2d 981 (1973); *Kaiser Broadcasting Corp.*, 45 F.C.C.2d 601 (1974); *Northern California Black Christian Group*, 45 F.C.C.2d 505 (1974).

petitioners are compelled to argue that because broadcasters are willing to settle cases, rather than undergo the hearing process, the format decisions have a chilling effect.[215] This is both inherently irrational, and directly contrary to the Commission's active encouragement of settlement of cases and emphasis on the importance of licensee-citizen dialogue and agreements. *See e.g., Agreements Between Broadcast Licensees and the Public*, 57 F.C.C.2d 42 (1975); *Newhouse Broadcasting Corp.*, 77 F.C.C.2d 97 (1980).

Actual settlements of cases which involve the potential abandonment of unique formats directly and dramatically demonstrate, better than virtually any argument, that the format decisions are correct in their protection of the First Amendment interest in diversity,[216] as well as statutorily compelled.

## D. The Format Decisions Do Not Violate the Anti-Censorship Provisions of the Act

The Court of Appeals correctly rejected arguments that the format doctrine constitutes censorship prohibited by Section 326 of the Communications Act, 47 U.S.C. § 326. In *Federal Communications Commission v. Pacifica Foundation*, 438 U.S. 726, 736

[215] *See* ABC Br. 63.

[216] For example, as a result of settlements reached between listeners groups and broadcasters, New York City listeners may still tune to their only 24-hour classical music station (WNCN-FM) and their only jazz station (WRVR-FM). Seattle listeners continue to have a classical music station (KXA-AM). WYLO-AM listeners in Milwaukee have not seen a unique "polka" format displaced by yet a third paid religion format, and residents of the Bay Area still "swing" to an unduplicated "Big Band" format (KMPX-FM). All of these unique formats served minority groups who would have sorely felt their loss, all contributed and contribute to general diversity in their listening areas. All are making a profit for the licensees who program them, none would be on the air but for the format decisions and the public interest in diversity which they protect.



(1978), this Court traced the legislative history of Section 326, and definitively concluded that the "anti-censorship" provision of the Act, 47 U.S.C. § 326, does not "deny the Commission the power to review the content of completed broadcasts in the performance of its regulatory duties." *Id.* at 735-737.

Neither censorship, prior restraint nor the Commission's subjective programming preferences enters into the question.[217] The congressionally-mandated regulatory scheme of which the format decisions are only one example in no way results in a chilling effect on any licensee's speech rights. *CBS v. DNC*, *supra*, 412 U.S. at 110; *Red Lion*, *supra*, 395 U.S. at 390, 395; *NBC v. U.S.*, *supra*, 319 U.S. at 216, 219.

## E. The Format Decisions Are Not Unconstitutionally Vague or Overbroad

The Commission argues that format analysis may be inherently vague and, on that supposition, suggests that it is unconstitutional.[218] To the extent that this argument is a recapitulation of its admin-

[217] The Commission has, in the past, never been troubled by imposing what might otherwise be characterized as prior restraints on licensees by approving or rejecting not merely general formats (unique or otherwise) but individual programs. *See e.g., Prime Time Access Rule*, 47 F.C.C.2d 769 (1973) (a waiver of the *Prime Time Access Rule* was granted to permit the broadcast of *National Geographic* programs, because they were of distinctive character); 43 F.C.C.2d 269 (1973) (approval for the same reason granted for the second time), *Prime Time Access Rule*, 43 F.C.C.2d 470 (1973) (the *Reasoner Report* warranted a waiver), *Prime Time Access Rule*, 45 F.C.C.2d 512 (1974) (*Animal World* warranted a waiver). *See also Henry v. FCC*, 302 F.2d 191 (D.C. Cir. 1962).

[218] FCC Br. 55.

istrative nightmare argument,[219] these contentions must be rejected. Insofar as it represents an attempt to bring the case within the Court's vagueness or overbreadth analyses, petitioners' efforts must be similarly fail.[220]

Notably, petitioners do not argue that the format doctrine as delineated by the Court of Appeals is facially invalid. Rather, it is contended that there are no existing administrative standards which would address hypothetical instances of the application of the format doctrine that have First Amendment "ramifications."

This argument is suspect, in view of the Commission's ability to resolve format controversies in the past.[221] It is entirely disingenuous given the Commission's own adamant refusal to develop such standards notwithstanding the suggestions and comments of the Court of Appeals,[222] citizens groups and commentators alike,[223] and it is ultimately untenable.

---

[219] The administrative nightmare argument included a variation on the vagueness theme, *i.e.*, the contention that the Commission could not adequately distinguish among formats. Both contentions have been entirely discredited by the Commission's own actions. *See* discussion at pp. 37-38 *supra*.

[220] As already discussed, there is absolutely no evidence that the format decisions have had any chilling effect on broadcasters, whether for vagueness or any other reason. Indeed, the evidence is to the contrary. Further, even if there were the possibility of a chilling effect, which there is not, this Court has noted that "the existence of a 'chilling' effect,' even in the area of First Amendment rights, has never been considered a sufficient basis in and of itself, for prohibiting state action." *Younger v. Harris*, 401 U.S. 37, 51 (1971).

[221] *See* notes 212 and 214 *supra*.

[222] The Court of Appeals in *WNCN* was particularly deferential to the Commission's discretion and expertise in promulgating such rules and policies as might be necessary to implement the statutory mandate.

[223] *See* discussion at pp. 40-41 *supra*.



## F. The Concept of Universal Service Expressed in the First Amendment and The Communications Act Makes the Format Doctrine Especially Appropriate to Protect Against the Loss of Unique Foreign Language Formats

The Commission has repeatedly emphasized that our system of broadcast allocation is based upon the premise that in a democratic society all members of the public must have access to information and a means of self-expression.[224] The specific intent of Congress that at least primary first broadcast service be provided to all the people of the United States is unequivocal.[225]

A key component of the Commission's public interest determination has always been the provision of service responsive to the diverse needs and interests of the community, in other words, universal service.[226] This concept has particular importance in light of the shift from the well-balanced format to the specialized format that took place in the 1960's in response to advertisers' switch to television.[227]

Petitioners have attempted to belittle the importance of format diversity simply by classifying it as "entertainment." This ignores the realities of the medium, in addition to the mandate of *Red Lion*, *supra*, 395 U.S. 390. The line between informing and entertaining is too elusive for gross First Amendment distinctions.[228]

---

[224] *See e.g., Sixth Report and Order*, 41 F.C.C. 148, 172 (1952). *See also* T. Emerson, THE SYSTEM OF FREEDOM OF EXPRESSION 653 (1970) [EMERSON].

[225] *See* 47 U.S.C. §§ 151, 303(g), 307(b). *See also FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358, 362 (1955), and *Television Corporation of Michigan v. FCC*, 294 F.2d 730 (D.C. Cir. 1961).

[226] *See e.g., NBC v. U.S.*, 319 U.S. 190, 215-218. *See also Great Lakes Statement*, Federal Radio Commission, *Third Annual Report* 32, 34 (1929).

[227] *See* UCC, *et al.* Opp. to Cert. at 9-10.

[228] *Winters v. New York*, 333 U.S. 507, 510 (1948).

This is particularly true in the context of formats oriented to ethnic, racial and cultural minorities.

The focus of the specialized music format, which in itself fosters and preserves cultural heritage and diversity, is transferred to the provision of "non-entertainment programming" such as specialized news, public affairs programming and information about political, social, educational and community services and events of particular interest and potential impact to those groups.[229] Thus, the entertainment format may provide the only viable and effective broadcast vehicle for informational and public affairs programming available to such minority groups.

Where a particular entertainment format involves foreign language programming, loss of that format may constitute actual loss of effective and meaningful broadcast service to a significant segment of a community. This point is concretely illustrated by the provision of Spanish language programming.

While most Hispanic-Americans, who comprise at least five percent of the nation's population, are bilingual, many regard Spanish as their primary language and have difficulty using English.[230] If a significant element of a community is unable to effectively receive communications other than by way of a foreign language format, the loss of that format clearly raises public interest questions of the greatest magnitude.[231]

---

[229] *See e.g., UCC et al. Petition for Reconsideration*, JA313-316.

[230] *See e.g., U.C.C. et al.* Opp. to Cert. at 18.

[231] Ironically, this obvious and critical public interest concern is acknowledged in the Commission's allocations policy, which generally requires affirmative action (*i.e.*, waivers, etc.) to prospectively *provide* a first foreign language service to a community. *See, e.g., International Radio, Inc., supra* and note 22 *supra*, at the same time that the *Policy Statement* prohibits even consideration of the issue where a unique foreign language format will be lost.



Under the Commission's view, as reflected in the *Policy Statement*[232] it is preferable to have 20 stations all talk about the same subject than one broadcasting in a unique foreign language, so long as there is marketplace consensus that most people are interested in the subject.[233]

This approach, which would exclude numerous critical sources of information and enlightenment for large numbers of demographically disfavored listeners, is simply impermissible under the public interest standard of the present Act.

Further, it is in direct violation not only of the public's First Amendment right to diversity of programming, but of all the most basic values underlying the First Amendment.[234]

---

[232] The Commission's view is, however, opposite where a licensee or potential licensee wants something from it, note 48 *supra*, than when it is citizens who protest a loss. This is yet another example, not merely of inconsistency, but of Commission hostility to representatives of the public *and* to the *UCC* decisions alike.

[233] The "people" are, of course, only those with high disposable incomes who are attractive to advertisers. *See e.g.*, JA 80-81, 171.

[234] Three major purposes of the First Amendment's guarantee of freedom of speech have been identified. These are:

1) furtherance of an open "marketplace of ideas," – *see, e.g., Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes and Brandeis dissenting); J. Milton, *Areopagitica, A Speech for the Liberty of Unlicensed Printing to the Parliament of England* (1644);

2) furtherance of intelligent, self-government in a democratic system, *see, e.g.*, Meiklejohn, POLITICAL FREEDOM (1960); Emerson, *supra* at 7; A. Bickel, THE MORALITY OF CONSENT 62-63 (1975); and

3) furtherance of the individual's ability of self-expression and thought, *see, e.g., Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis and Holmes, J.J., concurring).

All are negatively affected by the loss of a unique foreign language format.

The *Policy Statement*'s refusal to consider the public interest implications and First Amendment costs of the abandonment of a unique format, particularly one broadcasting in an otherwise unduplicated foreign language not only violates the statute, but is profoundly undemocratic,[245] in its rejection of the obvious needs of our pluralistic society.

[245] By abdicating all responsibilities to marketplace competition, statutorily required public interest determinations concerning the use of the public's airwaves are made only by those with market power, and no longer by those who have been appointed by and are responsible to the people's elected officials.



## CONCLUSION

For all the above reasons, the decision of the Court of Appeals should be affirmed.

Dated: New York, New York
August 26, 1980

Respectfully submitted,

KRISTIN BOOTH GLEN
36 West 44th Street
New York, New York 10036
(212) 869-1940
*Counsel for Respondent*
*WNCN Listeners Guild, Inc.*

DAVID M. RICE
Communications Media Center
New York Law School
57 Worth Street
New York, New York 10013
(212) 966-2953
*Counsel for Respondents Classical Radio for Connecticut, Inc. and Committee for Community Access*

WILHELMINA REUBEN COOK
JEFFREY H. OLSON
Citizens Communications Center
1424 16th Street, N.W.
Washington, D.C. 20036
(202) 483-0170
*Counsel for Respondents Office of Communication, United Church of Christ, The Mexican American Legal Defense Fund, The National Latino Media Coalition, The National Council of LaRaza, The Bilingual, Bicultural Coalition on Mass Media, The American G.I. Forum, and Public Communication, Inc.*

Earle K. Moore
*Of Counsel to Office of Communication, United Church of Christ*

The authors express their appreciation to Mark Conrad, Rita S. Eppler, Stuart Goldfarb, Michael S. Hassan, Michele Marqui and Madeline Nichols, *Student Interns*, and to Janel Radtke and Roberta Robbins, of the staff of New York Law School, for their invaluable aid in the preparation of this brief.